Bashā'ir al-futūḥāt wa-al-suʿūd fī aḥkām al-taʿzīrāt wa-al-ḥudūd

by Yaḥyā b. Abī al-Barakāt

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To: My Father:

This was your wish,

I have fulfilled it.

Fatima.

Acknowledgements

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Last, but not least, I wish to thank my husband, Rashid Nuaimy, who has been left alone at Riyadh while I have been working at Glasgow University and living in Edinburgh, and who has been a constant support.

Abstract

This thesis is essentially an examination of the ḥudūd, punishments divinely decreed for specific offences which involve a right both of God and of Man. It sets out from a practical hand-book, Bashā'ir al-futūḥat wa-al-Suʿūd fī Aḥkām al-taʿzīrāt wa-al-ḥudūd, by Yaḥyā b. Abī al-Barakāt al-Nāli al-Tlimsānī al-Ghammārī, written for a Moroccan ruler of the 8/14 century, an edition of which forms the first section, followed by a resume of the contents.

Even in a text dealing with a single school of Islāmic law, the Mālikī madhdhab, it is remarkable how many different opinions are given as to what the law actually is. This emerges even more strikingly in the most extensive section of the thesis, in which the attitudes of the various madhāhib to the ḥudūd are compared. The ḥudūd, together with the allied, but formally separate, matters of killing and wounding, which are often treated in conjunction with them, may be regarded as the core of the Sharīʿa, or at any rate of that part of it that deals with roughly what we should consider the criminal law; it is surprising, therefore, that, in spite of the fundamental measure of consensus, there should still be the degree of dispute that is evident, not only between the madhāhib but also between individual fuqahā' of the same madhhab, as to what the divine prescriptions concerning these offences and their punishments are, and, in some cases, as to which offences are covered by the ḥudūd. In particular, there seems, in some quarters, to be a certain confusion between ḥudūd and qiṣāṣ, presumably because both are of divine origin.

All in all, one is struck not only by the pains taken in the Sharīʿa to ensure that no injustice is perpetrated, but also by the degree of uncertainty that appears to obtain in what is often thought of as being a code of great rigidity and severity.

Notes on the edition

In a number of instances, MS ر is difficult to read, notably on the top line of the text, which is often virtually obliterated. In these instances, the reading of MS م has been adopted without this being indicated in the apparatus, provided that there is no reason to suppose that ر 's reading differed from this.

Orthographical peculiarities in the MSS have been 'normalised' in the edition; this course has been adopted for the purpose of making the text more accessible, and has been thought to be justified by the fact that the MSS differ between themselves in their peculiarities and are internally inconsistent in this respect. The peculiarities referred to are those that are frequent in MSS of all periods and provenances, e.g. *alif ṭawīla* for *alif maqṣūra*, *yā* for ذ , *dhāl* for *dāl* and vice versa.

Chapter 10 has fallen out of MS ر , except for two lines on p.123 (the pagination postdates this loss); this chapter has been copied, in very small handwriting in the margin of p.122, but this addition is virtually illegible. It has therefore been necessary to rely for this chapter on the unclear and unreliable text of MS م . In a number of instances it has been necessary to indicate that a reading is unclear, and for this purpose the symbol :=: has been used in the apparatus.

Other symbols employed are as follows:

-	=	missing in MS.
+	=	added in MS.
(ح)	=	in margin
x	=	repeated in MS.

(-)...+ = added and then deleted in MS.

< > = added by editor

( ) = ought probably to be deleted.

* = conjecture

Sigla:

ر = Rabat 1.

م = Meknes.

ع = Rabat 2.

(see description of MSS, below p.78)

Bashā'ir al-futūḥāt wa-al-suʿūd fī Aḥkām al-taʿzīrāt wa-al-Ḥudūd

Abū Zakariyyā Yaḥyā
Ibn Abī al-Barakāt

EDITION OF THE ARABIC TEXT

[1] بسم الله الرجمن الرحيم وصلى الله على سيدنا محمد وآله

كتاب بسائر الفتوحات والسعود [1]

الباب الأوّل	فيما يلزم في قتل النفس
الباب الثاني	فيما يلزم في الجراح وزوال الأعضاء أو بعضها
الباب الثالث	في مقدار الديات
الباب الرابع	فيما يلزم المحارب
[2] الباب الخامس	فيما يلزم البغاة [3]
الباب السادس	فيما يلزم السرقة
الباب السابع	أحكام التعزيرات وما يوجب الضمان
الباب الثامن	ما يلزم في القذف [2]
الباب التاسع	حكم تارك الصلاة والصيام والحجّ ومانع الزكاة
الباب العاشر	ما يلزم من سبّ الله تعالى او الأنبياء او الملائكة او الصحابة
الباب الحادي عشر	في حكم الردّة
الباب الثاني عشر	في حكم الزنى
الباب الثالث عشر	فيما يلزم في الشرب
الباب الرابع عشر	في كيفية اقامة الحدود
الباب الخامس عشر	فيمن تتوجّه عليه الدعوى بهذه الجنايات ومن لا تتوجّه عليه
الباب السادس عشر	في التعزيرات
الباب السابع عشر	في أحكام أهل الذمّة

١ بسم — والسعود: — ر
٢ الباب — القذف :— ر
٣ البغاة : البغات م

بسم الله الرحمن الرحيم وصلى الله على سيدنا[1] محمد وآله وصحبه تسليما[1] ٢

بشائر الفتوحات والسعود

أمّا بعد شكر الله وحمده ، والصلاة والسلام على سيّدنا ومولانا محمّد رسوله / المصطفى وعبده ، والرضاء عن آله وصحبه حزبه الكريم وجنده ، والدعاء للمقام ٣
العليّ بنصر عزيز وتأييد من عنده ،

فهذا كتاب مبارك مختصر مفيد في أحكام / الدماء والحدود والديات ٤
والزواجر والعقوبات[2] والتعزيرات . أمر بانشائه وأشار الى استنباطه واملائه مولانا ومولى الأنام والملك الهمام السلطان الامام عبد الله المتوكّل على الله
المنصور بفضل الله / أمير المسلمين وخليفة ربّ العالمين مولانا أبو عبد الله ٥
ابن السلطان الكبير الشهير الخليفة الامام المقدّس المنعّم المرحوم أبي عبد الله
محمّد الشابتي أيّده الله بنصر مكين وفتح مبين وأبقاه لصلاح / الدنيا والدين ٦
قامعا للمفسدين ونافعا للمصلحين ورافعا لمنار العلم والعلماء[3] والاسلام والمسلمين وجعل الملك فيه وفي عقبه الى أن يرث الله الارض ومن عليها وهو
خير الوارثين ليكون نظره الكريم مقصورا / عليه وتصير همّته السنيّة مصروفة ٧
اليه . ولما في كتب الأحكام من التطويل ولعدم اختصاصها بهذا المقصد الجليل فجمعته له[4] ان شاء الله على وفق مراده معتمدا فيه على عون الله
وامداده / ومنعطفا بالصلاة والسلام على خير عباده . ٨

١ — ر ٢ العقوبات : العقوبة م

٣ والعلماء : ر (ح) ، — م ٤ له : ر (ح) ، — م

بـاب مـا يـلـزم في قتل النفس

اعلـم ان قـتـل الـنـفـس حـرام بـاجـماع الاّ فـي حقّ من الحقوق الشرعيّة • قـال
الله تـعـالـى : ولا تـقـتـلـوا الـنـفـس الـتي حرّم الله الاّ بـالـحقّ • فمن قـتـل / نـفـسا ٩
بـغـيـر حقّ عـلـى وجه العمد والعدوان والظلم المحض أخذ بـهـا ان كـان بـالـغـا عـاقـلا
وكـان المقـتـول مـثـلـه في الاسلام والحرّيّة فـيـسـتحقّ الاولـيـاء الدم فـيـقـتـلـونـه عنـه
ولـيـس لـهم بـعـد العـفـو انـتـقـال الـى الـديـة عـلـى الـمـشـهـور / من المذهب المعلوم مـن ١٠
قـول مـالـك وابـن الـقـاسـم •

وقـال أشهب يـخـيّـرون بـين القـتـل أو العـفـو بـالـديـة أو بـغـيـر الـديـة ولـهم ان
يـصـالـحـوا عـلـى مـقـدار الـديـة أو أكـثـر أو أقـلّ •

فـاذا ثـبـت الـقـتـل لـزم الـقـصـاص بـمـثـل مـا وقـع بـه الـقـتـل وعـلـى صـفـتـه / مـن ١١
غـيـر زيـادة الاّ الخمر واللواط فلا يـعـاقـب القـاتـل بـالـقـتـل بـهـمـا [1] واختلف فـي
الـنـار والسمّ اذا قـتـل بـهـمـا هل يـقـتـصّ مـنـه بـهـمـا وظـاهـر المدوّنة جواز الـقـصـاص
بـهـمـا • فـيـقـتـل [1] الحرّ بـالحرّ والعـبـد بـالـعـبـد والـكـافـر بـالـكـافـر والعـبـد بـالحرّ
/ والكـافـر بـالـمـسـلـم والذكر بـالأنثى والأنثى بـالـذكـر والذكر بـالذكر والأنـثـى ١٢
بـالأنثى والكبـيـر بـالـصـغـيـر والكامل الأعضاء بـنـاقـصـهـا والصحيح الجسم بـالـمـريـض
والشريف بـالدنيّ والدنيّ بـالـشريف والرفـيـع بـالـوضـيـع / والـوضـيـع بـالـرفـيـع • ولا ١٣
يـقـتـل حرّ بـعـبـد ولا مسلم بـكـافـر الاّ اذا قـتـلا قـتـل غـيـلـة وهو أن يـقـتـلـهـمـا عـلـى
وجه الغـدر بـحـيـلـة أو نـحـوهـا لـيـأخـذ مـالـهـمـا فـحـكـمـهـمـا حـكـم الحرّ المسلم ولا يـجوز
العـفـو فـيـه لا من سلـطـان ولا من وليّ لأنّه / كـالـمـحـارب • وتـقـتـل الجـمـاعـة ١٤
بـالـواحد والـواحـد بـالـجـمـاعـة والمتسبّب في القتل مع المباشر له والمعين عليه
والآمر بـالـقـتـل والمأمور بـه اذا كـانـا مـمـيّـزين مـكـلّـفـين • والصحيح ان المأمور
اذا كـان لا يـخـاف عـقـوبـة الآمر / أنّه يـقـتـل وحده دون الآمر • ١٥

١ — م

واذا قتل الكافر كافرا ثمّ أسلم فلا يسقط عنه القصاص بالاسلام . وكذلك
العبد اذا قتل أحدا ثمّ أعتقه سيّده فانّ العتق لا يسقط عنه القتل وان شاء
١٦ الأولياء استرقاقه فلهم / ذلك ويردّون العتق أو يفتكّه منهم سيّده ان أحبّوا
بدية المقتول ان كان حرّا أو قيمته ان كان عبدا . والسكران ان قتل أحدا
قتل به . والمجنون اذا قتل في حال افاقته قتل كالصحيح العقل . واذا قتل
١٧ الأب ابنه على وجه لا يشكّ معه أنّه / تعمّد لقتله فانّه يقتل به على
المشهور خلافا لأشهب . واذا قتل وليّ الدم القاتل فلا شيء عليه سوى الأدب
لافتياته على الامام واذا قتله أجنبيّ فللوليّ قتله به لأنّه فوّت عليه من
١٨ تعلّق حقّه به واذا قتله بعض الأولياء / فللآخرين مطالبته بنصيبهم من
الدية .

وأولياء الدم هم ورثة الميّت[1] والأقرب من الورثة مقدّم على الأبعد على[2]
ترتيب الميراث ومن لم يكن له وليّ فالسلطان وليّه . واذا كان الوليّ صغيرا
١٩ أقام له السلطان من ينوب عنه . واذا[3] كان ورثة الميت نساءا / فالولاية
لهنّ على المشهور . واذا غاب بعض الأولياء فليس للحاضرين متكلّم حتّى يقدم
فان أيس من قدومه لم ينتظر . واذا قتل واحد جماعة فقتله من أوليائهم
واحد سقط حقّ الباقين .

٢٠ ويثبت القتل على القاتل / باقراره أو بالبيّنة العادلة التي لم يبق له
معها حجّة وان كان له حجّة أخّر للنظر فيها حتّى يأتي بها أو يعجز عنها .
فان طلب سجن غريمه حتّى يقيم عليه البيّنة أو يكمّلها فله ذلك وليس له
٢١ أن يطالبه بالضامن لأنّ القصاص لا ضمان / فيه على المعروف من المذهب . ويثبت
أيضا بقول الميّت دمي عند فلان أو فلان قتلني ونحوه عمدا اذا كان حرّا مسلما
مكلّفا أو بشاهد واحد على القتل أو بشاهدين على الجرح خاصّة ثمّ يموت بعد
٢٢ أن أكل وشرب وبالشهادة / على رؤية المقتول يتشحّط في دمه والمتهوم بقتله
قريبا منه وبيده آلة القتل أو عليه أثر من آثاره وبوجود المقتول مطروحا

١ الميت : الميتة م ٢ على : — م ٣ اذا : ان م

عند باب أحد أو في قرية أو مجشر أو زنقة على / المشهور الاّ أنّه في هذه ٢٣
الوجوه التي هى قول الميّت وما بعده لا يثبت الاّ مع القسامة وهي أن يحلف
الأولياء البالغون العاقلون المستحقّون للدم خمسين يمينا على دعوى ميّتهم
أو دعواهم بالدلائل المذكورة ان كانوا اثنين فأكثر وكان / المقتول واحدا ٢٤
ويستحقّون الدم. أمّا ان كان وليّ الدم واحدا أو كان المقتول أكثر من
واحد فلا قسامة وتبطل الدعوى. ولا قسامة في الجراح ولا بين العبيد ولا
بين أهل الذمّة.

واذا أراد الأولياء أخذ الدية وأبى / القاتل الاّ القصاص فالقول قول ٢٥
الأولياء وقيل قول القاتل.

ولا يرث قاتل العمد من مال ولا دية ومن عفي عنه في قتل العمد ضربه
الامام مائة وسجن عاما. وكذلك اذا أبى المدّعى عليه بالقتل من اليمين
/ فانّه يطال حبسه حتّى يحلف وان امتنع ضرب مائة وبقي في السجن عاما. ٢٦

ومن ضرب امرأة فألقت جنينا ميّتا وبقيت هي حيّة ففيه الغرّة اذا كان
حرّا مسلما على ما سنبيّنه في باب تقدير الديات ان شاء الله وسواء / كان ٢٧
عمدا أو خطأ. فان خرج بعد موتها فلا شيء فيه على المشهور. وان انفصل
من أمّه حيّا ومات بفور خروجه ففيه الدية ان كان خطأ وان كان عمدا فكذلك
على المشهور وقيل فيه القصاص. وان مات بعد / مدّة متراخية فكذلك الاّ أنّ ٢٨
فيه القسامة. وسواء كمل خلقه أو كان مضغة أو علقة أو دما منعقدا
بشرط أن يكون الضرب في الظهر أو البطن أو الجنب وقيل وفي الرأس بخلاف الرجلين
وكذلك اذا خوّفها / ولم يضربها فألقت الجنين بشروط خمسة : ٢٩

الأوّل أن يثبت التخويف بالبيّنة أو بالاقرار.

الشرط الثاني أن يكون ما خوّفها به ممّا يخاف منه.

الشرط الثالث أن يخوّفها في أمر لا يحلّ.

الشرط الرابع أن يشهد الشهود على أنّها لزمت الفراش من حين/التخويف الى
أن أسقطت . ٣٠

الشرط الخامس أن يعاين النساء السقط ويشهدن به[1] .

واذا كان القتل خطأ فلا قصاص فيه والواجب فيه الدية خاصّة . فمن قتل
انسانا خطأ فالدية على عاقلته سواء كان صغيرا / أو كبيرا أو مجنونا ٣١
فالصبيّ والمجنون عمدهما كالخطأ . وكذلك الطبيب الذي لا يقصد بفعله الاّ الصواب
فينشأ عنه الهلاك والأب والمعلّم مثله أعني لا يلزمهما القتل .

واذا وجبت دية الخطأ فيفرضها / الامام على العاقلة منجمة على ثلاث ٣٢
سنين من يوم الحكم . ولا تحمل العاقلة جناية العبد ولا دية العمد ولا دية
الصلح ولا دية من قتل نفسه ولا دية من وجبت عليه بالاقرار بالقتل ولا أقل
من ثلث الدية . / واذا عفا المقتول عن القاتل في الخطأ فلا يمضي الاّ ثلث ٣٣
الدية .

والعاقلة هم عصبة القاتل الذكور الأحرار وهو داخل معهم وسواء قربوا او
بعدوا ويضمّ اليهم من القبائل الأقرب فالأقرب / ومن قومهم قال سحنون حدّ[2] ٣٤
العاقلة سبعمائة ينتسبون الى أب واحد . وذكر عنه ابن رشد اذا كانت
العاقلة خمسمائة أو ألفا فهم قليل ويضمّ اليهم أقرب القبائل اليهم ومن
سكن من العاقلة / مع قوم فهو[3] داخل معهم ما لم ينتقل الى جماعة أخرى ٣٥
وينقطع عن التي كان معها وان انتقل يوم فرض الدية وقيل ان انتقل قبل
فرضها ولو بأيّام قليلة . ويفرض على كلّ واحد ما لا يضرّ به في ماله فيؤخذ
/ من الغنيّ بقدره ومن الذي دونه بقدره بحسب اجتهاد الامام ولا يؤخذ شيء من ٣٦
الفقير ولا من الكافر ولا يدخل أهل البادية مع أهل الحاضرة ولا أهل الحاضرة مع
أهل البادية في الدية ولو كانوا قبيلة / واحدة . ٣٧

١ به : — م ٢ حد : حدوا م ٣ فهو : فهم م

ولا تحمل العاقلة من دية الجراح الاّ ما بلغ تقديره ثلث دية النفس ولا تحمل أيضا الدية المغلّظة وهي التي تكون على الأب أو الجدّ اذا قتل ولده أو ولد ولده على غير وجه العمد.

والمسلم ان قتل كافرا فعليه الدية والحرّ / ان قتل عبدا فعليه قيمته. ٣٨

واذا انفصلت قبيلتان عن قتلى فان علم القاتل أخذ وان لم يعلم فدية كلّ فرقة في مال القبيلة الأخرى. فان كانوا من غيرهم فديتهم على الصفّين
وان كانوا من صفّ واحد فديتهم / في مال الصفّ الآخر. ٣٩

فاذا التطم فارسان متعمّدان فماتا فلا حقّ بينهما وان عاش أحدهما اقتصّ منه. وكذلك الماشيان أو الماشي والراكب وان كان على وجه الخطأ فدية
كلّ واحد منهما / على عاقلة الآخر وقيمة كلّ فرس في مال الآخر. واذا كان ٤٠
أحدهما حرّا والآخر عبدا فدية الحرّ في رقبة العبد وقيمة العبد في مال الحرّ.
وما يصيب به الفرسان بعضهم بعضا في ملاعبهم في الأعياد ونحوها / من جراح ٤١
أو قتل فحكمه حكم العمد لا حكم الخطأ.

واذا اتّبع انسان شخصا بسيف أو نحوه ليضربه به فهرب منه فعثر الهارب فمات قبل أن يدركه صاحب السيف فالقصاص على التابع ولا يقتل العبد
المسلم / بالحرّ الكافر. ٤٢

واذا قتل شخص انسانا بعد أن جرحه فان كان فعله في فور واحد فليس عليه الاّ القتل وان كان بينهما طول اقتصّ منه في الجرح ثمّ قتل. واذا أنفذ[1]
شخص مقتل[2] انسان ثمّ جاء آخر فأجهز عليه / فالقتل على الأوّل والأدب على ٤٣
الثاني. هكذا قال ابن القاسم. وقاتل الخطأ يرث من المال لا من الدية.

١ أنفذ : انفد ر م ٢ مقتل : ما قتل م

باب ما يلزم في الجراح وزوال الأعضاء أو بعضها

اعلم أنّ الجراح اذا كانت / عمدا فليس فيها الاّ القصاص على المشهور ٤٤
من مذهب مالك لقوله تعالى : والجروح قصاص ، الاّ المتالف فانّ فيها الدية
على ما نبيّنه بعد ان شاء الله . وقيل : يخيّر المجروح [١] بين أن يقتصّ أو
يأخذ الدية ، وهذا مقابل المشهور.

والمتالف / هي: ٤٥

الجائفة ، وهي التي نفذت الى الجوف من البطن أو الظهر.

والهاشمة ، وهي التي تشدخ عظم الرأس .

والمنقّلة ، وهي التي طار [٢] من عظم الرأس بسببها جزء أو انكسر ولم [٣] تصل الى الدماغ.

والمأمومة ، وهي ما وصل الى الدماغ ولو / بمقدار رأس الابرة . ٤٦

والدامغة ، وهي التي تخرق خريطة الدماغ.

ورضّ الأنثيين وكسر الفخذ وكسر الصلب ودق العنق من المتالف أيضا ، لا قصاص في واحد منها وانّما فيها الدية .

وليس في جراح الخطأ قصاص ولا دية / مقدّرة الاّ في الموضّحة ، وهي التي ٤٧
يتّضح بها عظم الرأس . وأمّا غير الموضّحة فان برىء على عيب ففيه الحكومة
وهي ما يجتهد فيه الامام يؤخذ من الجاني ، وان برىء على غير عيب فلا شيء
فيه سوى الأدب . هذا في جميع جراح / الجسد سوى ما قدّمناه . ٤٨

وأمّا الأعضاء فقطع اليد والرجل والأذن والأنف واللسان والذكر والأنثيين
وزوال العين والشفتين والأسنان والأصابع [٤] والأنامل ، وفي معناها ذهاب
العقل والشمّ والنطق والسمع والبصر ونحو ذلك ، ففي كلّ واحد / من هذه الدية ٤٩

١ المجروح : الجروح م   ٢ طار : صار م   ٣ ولم : ولو م

٤ الاصابع : الاصباع م

أو الحكومة على ما نفسّر ان شاء الله . وما ذهب من المنافع بسبب زوال العضو أو بعضه فان أمكن القصاص على نحو ذلك اقتصّ وان لم يمكن فالدية في كليهما أو في ما لا يمكن القصاص فيه منهما والقصاص في الآخر./ ولا قصاص في جرح ولا دية الآ بعد البرء [1] ولا قصاص الآ بعد معرفة قدر الجرح طولا وعرضا وعمقا .

١ البرء : البره م

بـاب مقدار الديـات

وديـة الحرّ المسلم الذكر علـى أهل الابـل مـائة من الابـل وعلـى أهل / الذهب ٥١
ألـف دينـار وعلـى أهل الفضّة اثنـا عشر ألـف درهم ٠ وديـة المرأة الحرّة المسلمة
علـى النصف من ذلـك ٠ وديـة اليـهوديّ والنصرانيّ علـى النصف من ديـة المسلم وديـة
نسائـهم علـى النصف من ديـة رجالـهم ٠ وديـة المجوسيّ ثمانيماءة درهم / وديـة ٥٢
المجوسيّة والمرتدّة علـى النصف من ذلـك ٠ وديـة العبد قيمته ولـو زادت علـى ديـة
الحرّ ٠ وديـة الجنين الحرّ عشر ديـة أمّه ، ولـو كـان أبـوه حرّا وأمّه أمّ ولـد
فكذلـك أيضا يجب [1] فيـه نصف عشر ديـة الأب ٠ وديـة الجنين العبـد / عشر قيـمة ٥٣
أمّه ٠ والمجوسيّ والذمّيّ عشر ديـة أمّهاتـهم ٠ فيـعطى الحرّ خمسين دينـارا أو
ستّمائة درهم أو عبدا أو أمة تساوي الخمسين ، والكـافر الذمّيّ خمسة وعشرين
دينـارا أو ثلاثمائة درهم ، والمجوسيّ أربـعين درهما ٠ ولا تكون ديـة الجنين
/ علـى العـاقلـة وانّما هي في مـال الجاني ٠ واذا تعدّد الجنين تعدّد مـا يجب ٥٤
فيـه من غرّة ان انفصل ميتـا أو ديـة ان انفصل حيّا علـى مـا تقدّم ٠

وديـة الموضّحة نصف عشر الديـة ٠ وفي الـهاشمة والمنقّلة عشر ونصف عشر
الديـة ٠ وفي المأمومة / ثلـث الديـة ٠ وفي الجائفة ثلـث الديـة ٠ وفـي ٥٥
هاشمة البـدن ومأمومته غيـر الرأس [2] الاجتـهاد ٠ وفي كسر الفخذ ثلـث الديـة ٠
وفي زوال العقل الديـة كـاملـة ٠ وفي كلّ واحدة من العينـين نصف الديـة وفيـهما
معـا الديـة كـاملـة ٠ وفي عين الأعور / الصحيحة الديـة كـاملـة ، وسواء كـانـت ٥٦
العيـن قويّة النظر أو ضعيـفة بـأمر من الله ٠ وفي زوال حدقة العين العميـاء
الاجتـهاد ٠ وفي كلّ أذن نصف الديـة وفيـهما معـا الديـة كـاملـة ولـو بقي السمع ،
وعن مـالـك في ذلـك الاجتـهاد ٠ وفي الأنف / الديـة وسواء قطع كلّه أو طـرفـه ، ٥٧
واذا قطع بـعض طرفه ففيـه بـمقدار مـا نقص من ذلـك الطرف ، لا من الأصل ٠ وفي
الشفتـين معـا الديـة كـاملـة وفي احداهمـا نصف الديـة [3] ٠ وفي ذهاب السمع الديـة
كـاملـة ان ذهب من الأذنين / معـا وان كـان من واحدة فنصف الديـة ٠ وفـي ٥٨

١ يجب : يجيب م ٢ + غيـر (-) ر ٣ + كـاملـة (-) ر

زوال أذن الأصمّ الاجتهاد • والشمّ والذوق والنطق والصوت والكلام وقوّة الجماع
ومنفعة القيام ومنفعة الجلوس في كلّ واحد منها الدية كاملة • [1]وفي قطع
اللسان كلّه الدية / كاملة [1]، وكذلك في قطع بعضه اذا منع الكلام• وفي ٥٩
لسان الأبكم الاجتهاد• وفي كلّ سنّ خمس من الابل سواء كانت من الأضراس
أو من غيرها ، وسواء قلعت من أصلها / أو كسر بعضها ، وكذلك اذا اسودّت ٦٠
أو احمرّت أو تحرّكت خاصّة لمن لا تنبت له، ولا شيء في سنّ الصبيّ الصغير الذي
تنبت له • ومن أسقط سنّا متحرّكة فعليه الاجتهاد•

وفي كلّ واحد من شديي المرأة نصف الدية وفي / جميعها الدية كاملة ، ٦١
وسواء قطعا من أصلها أو رأسها اذا بطلت منفعتها من اللبن • وفي
بطلان اللبن وحده الدية كاملة• وفي شدي من ليس لها الاّ شدي واحد الدية
كاملة، وكذلك بطلان لبنه • وفي شدي الرجل الاجتهاد • وفي كسر عظام
الصدر / الدية كاملة • وفي كسر الظهر الدية كاملة • وفي كلّ واحد من ٦٢
اليدين نصف الدية، وسواء قطعت من المرفق أو من المنكب أو من الكوع أو من
الأصابع، وفي اليد الشلاّء التي لا منفعة فيها الاجتهاد • وفي كلّ أصبع عشر
الدية، وفي كلّ / أنملة ثلث عشر الدية الاّ الابهام ففي كلّ أنمله منه نصف ٦٣
عشر الدية• وفي قطع الذكر كلّه أو قطع حشفته وهي رأسه من محلّ الختان الدية
كاملة ، وفي قطع[2] بعض الحشفة بمقداره من الحشفة،لا من الأصل • ولو قطع
الذكر وهو بلا حشفة / أو لا منفعة فيه كذكر العنين الذي لا يتأتّى به الجماع ٦٤
لصغره وذكر الشيخ الهرم والحصور الذي لا يأتي النساء فليس فيه الاّ الاجتهاد•
وفي الأنثيين معا الدية كاملة، وفي البيضة اليسرى وحدها الدية كاملة، وفي
اليمنى وحدها / الاجتهاد • واذا قطع الذكر والأنثيان في دفعة واحدة ففي ٦٥
كلّ واحد الدية، أي فيهما ديتان • وفي قطع فرج المرأة الدية كاملة اذا
ظهر العظم ، وفي زوال البكارة [3] بالأصبع الاجتهاد ، وسواء فعله الزوج أو
الأجنبيّ ، وفي زوال أليتي المرأة / الاجتهاد عند ابن القاسم ، وقال أشهب : ٦٦
فيهما الدية كاملة•

١ × م ٢ قطع : ـ م ٣ البكارة : البكارات م

وفي كلّ واحد من الرجلين نصف الدية ، وسواء قطعت من الورك [١] أو من الركبة أو الركبتين [١] أو من الكعبين أو من الأصابع . وفي كلّ أصبع من أصابعها أو أنملة من أناملها ما في اليد . وفي شعر الرأس والحاجبين / واللحية وأشعار العينين الاجتهاد . ولا قصاص في اللطمة . وجراح المرأة ٦٧
يلزم فيها ما يلزم في جراح الرجل بالنسبة الى ديتها[٢]. [٣] وكذلك الكافر بالنسبة الى ديته[٣]. وجراح العبد على نسبة قيمته . وقطع الأطراف ونحوها الذكر والأنثى فيه سواء أيضا في النسبة الى ديتهما.

١ — ر ٢ ديتها : اديتها م ٣ ر (ح)

/ باب ما يلزم المحارب ٦٨

قال الله تعالى : انّما جزاء الذين يحاربون الله ورسوله ويسعون في
الأرض فسادا أن يقتّلوا أو يصلّبوا أو تقطّع أيديهم وأرجلهم من خلاف أو ينفوا
من الأرض ذلك لهم خزي في الدنيا ولهم في الآخرة عذاب عظيم . فاذا ظفر
/ الامام بمحارب قبل مجيئه تائبا فلا يجوز له أن يعفو عنه ، فان كان قتل ٦٩
أحدا فلا بدّ من قتله ، واذا كان لم يقتل أحدا فالامام مخيّر في اجتهاده بين
قتله [١] بلا صلب [١] أو [٢] صلبه [٣] ثمّ قتله وهو مصلوب أو يقطعه من خلاف أي
تقطع يده اليمنى / ورجله اليسرى أو ينفيه ان كان حرّا ذكرا الى بلد آخر ٧٠
يسجنه به حتّى يتوب أو يموت في السجن . واذا [٤] جاء تائبا قبل أخذه فلا
يحكم عليه بهذا الحكم ويحكم عليه بحكم آخر وهو أن يطالبه الامام بحقوق
الناس ان ترتّبت عليه ويأخذه بها ، وان لم / يجب عليه شيء من حقوق الناس ٧١
تركه ولا يطالبه بحقوق الله . وما سلبه المحاربون من الأموال يلزمهم غرمه
ولو كانوا جماعة وأخذ منهم واحد ضمن كلّ ما سلبوه من الناس ويرجع هو على
أصحابه .

فمخيف الطريق وان لم يأخذ مالا ولم / يقتل أحدا محارب ، والذي خرج ٧٢
لقطع الطريق وظفر به قبل أن يقطع الطريق أو يفعل شيئا محارب ، والذي يسقي
المرقد لأخذ المال محارب ، والذي يشهر السلاح لأخذ المال وان لم يصب به أحدا
محارب ، والمنفرد وحده للتلصّص في بلد محارب ، والذي يخدع / أحدا ويغرّه ٧٣
حتّى يدخله موضعا فيسلبه محارب ، وكلّ من أعان المحارب بشيء فهو محارب .

والحكم بالتخيير في عقوبة المحارب مخصوص بالامام لا يجوز لغيره أن يحكم
به . واذا أوقع السلطان بالمحارب عقوبة فلا حقّ لأحد عليه بعد ذلك .

وتثبت [٥] / الحرابة على المحارب بالشهادة عليه ولو كان الشهود [٦] من ٧٤

١ ر (ح) ٢ + قتله و (ح) ر ٣ + ثم قتله أو صلبه (-) ر
٤ واذا : واذ ر ٥ تثبت : ثبتت م ٦ الشهود : المشهود م

المسلوبين ، وباشتهاره في الحرابة وحصول العلم للناس بفعله ، ويشهد بذلك شاهدان وان لم يروه .

باب ما يلزم في البغاة [1]

البغاة[1] هم الذين يخرجون عن طاعة / امام المسلمين مخالفين له على ٧٥
وجه المكابرة والمعاندة والمغالبة ، وكذلك ان كانوا تحت طاعته ولم يخالفوا
عنه الاّ أنّهم منعوا حقّا من الحقوق ، ولو بتأويل . فللامام العدل قتالهم
كقتال الكفّار من ضرب بسيف ورمح وحجر ورمي / بسهام ومجانيق وتغريق وتحريق، ٧٦
ولو كان معهم النساء والذراريّ ،بعد أن يدعوهم الى الدخول في طاعته ورجوعهم
الى الحقّ . ولا يقتل الامام منهم من حبس[2] الاّ في قيام الحرب والقتال ، وله
قتل من في قبضته منهم اذا خاف أن تدور / عليه منهم دائرة وتحقّق من حاله ٧٧
الضعف وعدم القدرة عليهم . واذا أمن عودتهم وتخقّق كسر شوكتهم فلا يجهز
بالقتل على المجروح منهم، ولا يقتل المنهزم[3]. وقد نادى منادي عليّ بن أبي
طالب رضي الله عنه في بعض حروبه مع / البغاة ألاّ يتّبع هارب ولا يجهز على ٧٨
جريح ولا يقتل أسير منهم. ثمّ كان في حرب آخر مع آخرين فأمر فيه باتّباع
الهارب وقتل الأسير والاجهاز على المجروح . فعوتب في ذلك فقال : هؤلاء لهم
جماعة وملجأ ينحازون اليه، والأوّلون / لم تكن[4] لهم فيئة يلجئون اليها. واذا ٧٩
احتاج الامام الى أخذ أموالهم وسلاحهم وكراعهم ليستعين بها عليهم فله
ذلك. ثمّ يردّه عليهم بعد رجوعهم للحقّ هو أو غيره من الأئمّة. وهكذا
فعل عليّ رضي الله عنه.

وان ولّى[5] أهل التأويل قاضيا / وأخذوا من الناس الزكوات فقال ابن ٨٠
القاسم : لا ينفذ شيء من ذلك ولا يصحّ . وللامام نقض جميع أحكامهم وعلى
المعاندين القصاص فيما أتلفوه من الأنفس والضمان للأموال . واذا كان معهم
أهل الذمّة فقد نقضوا العهد، والله أعلم .

١ البغاة : البغات ر م ٢ حبس : حسب م ٣ المنهزم : المنهجم م
٤ لم تكن : — ر ٥ ولى : ولا ر م

/ باب ما يلزم في السرقة [1] ٨١

السرقة هي أخذ المال خفية من غير محاربة . ولذلك قالوا في سرّاق
المغرب انّهم لصوص محاربون لأنّهم يأتون بالسلاح، وكلّ حامل سلاح ليأخذ به المال
محارب ، سواء كان في الليل [2] أو النهار. قال الله تعالى : والسارق
والسارقة / فاقطعوا أيديهما [3] جزاء بما كسبا نكالا من الله والله عزيز حكيم. ٨٢
ويلزم السارق ان كان بالغا عاقلا قطع يده اليمنى ان كانت صحيحة ، فان كانت
شلاّء أو ناقصة الأصابع أو كان لا يمين له قطعت يده اليسرى / فاذا قطعت [4] ٨٣
يده اليمنى وعاود قطعت رجله اليسرى ، ثمّ ان عاد قطعت يده اليسرى ثمّ ان عاد
قطعت رجله اليمنى ، ثمّ ان عاد ضرب ونفي وسجن . وقيل : يقتل . فالذي
لا يمين له اذا قطعت يسراه ان عاد قطعت رجله اليسرى . وكلّ ما قطع لزم
تحسيمه / بالنار. ٨٤

واذا تعمّد القاطع قطع اليد اليسرى فالقصاص عليه فتقطع اليمنى ثانيا ،
واذا أخطأ فلا شيء عليه وتجزىء عن اليمنى .

واذا سرق السارق أقلّ من ربع دينار أو أقلّ من ثلاثة دراهم أو أقلّ من
قيمته يوم السرقة فلا قطع / عليه . ولا يقطع السارق الاّ اذا سرق من الحرز، ٨٥
وهو الموضع الذي يكون معدّا لحفظ المال بحيث لا يكون الانسان فيه مفرّطا
ومضيّعا ... وحرزه ولو كان بغير غلق . فيقطع من سرق أبواب المسجد
أو أغلاقه أو خشب سقفه أو مصابيحه المعلّقة / أو حصره المخيّطة بعضها ببعض ، ٨٦
وكذلك المسمّرة على الحيطان . ويقطع من سرق الكفن من القبر . ويقطع من
سرق من بيت المال أو الغنيمة بعد حوزها أو من الدور أو من الحوانيت أو من
ساحاتها الخارجة اذا وضع فيها ما يباع،/ ويقطع من سرق من وسط الدار أو ٨٧
وسط الفندق اذا وضعت فيهما الأحمال والأثقال ، ويقطع من سرق ممّا على ظهور
الدوابّ [5] أو من مواقف البيع ، ويقطع من سرق الدوابّ [5] من مواقفها مربوطة

١ السرقة : السريقة م ٢ الليل : اليل م ٣ ايديهما : × م
٤ فاذا قطعت : × م ٥ ر (ح)

كانت أو غير مربوطة. ويقطع من سرق من الأخبية أو ساحاتها. ويقطع من[1]
سرق من القطار / سواء كان سائرا أو واقفا. ويقطع من سرق من السفينة ٨٨
الراسية كان فيها أحد أو لم يكن ، ومن (غير) الراسية ان كان فيها أحد.
ويقطع من سرق من المطامير في أي موضع كانت. ويقطع من سرق من الجيب أو
من الكمّ أو من الحمّام ان كان له / حارس في وقت دخول الناس ، وان لم يكن ٨٩
له حارس[2] فيقطع اذا سرق في غير وقت دخول الناس. ويقطع من سرق الغنم
من مراحها أو الزرع من الأندر أو العبد غير المميّز[3]. ومن سرق حرّا قطع
فان باعه غرم ديته. ومن ابتلع ياقوتة أو درّة أو / دراهم[4] أو دنانير ٩٠
وخرج بها من موضعها قطع ، وكذلك ان دهن رأسه أو لحيته بدهن أو طيب
يساوي ربع دينار فأكثر بعد سلته فانّه يقطع. ولا قطع على من خطف شيئا أو
اختلسه ولا على الغاصب ولا على من أخذ / بالسرقة قبل أن يخرج بها من موضعها، ٩١
ولا على ضيف ولا زوجة الاّ أن سرقا من موضع محجور عليهما، ولا على سارق مال
ابنه ، ولا على من سرق من دار الأمير أو القاضي أو المفتي أو الطبيب في وقت
الأذن في الدخول. ولا قطع على من سرق / ما على الصبيّ الصغير اذا كان ٩٢
وحده.

واذا نقب السارق وأخرج السرقة غيره وهما متّفقان قطعا معا. واذا
نقبا معا وأخرج أحدهما قطع من أخرج. واذا سرق واحد وبقي آخر خارجا
وناوله الداخل قطع الداخل. واذا دخل أحدهما / وأدخل له الخارج يده من ٩٣
نقب أو كوّة أو باب وناوله وأخرج قطع الخارج. ومن ربط حبلا أو نحوه في
متاع وهو خارج وجذبه[5] اليه قطع. واذا حبس السارق قبل أن يخرج من
الموضع وقد كان رمى[6] بالسرقة الى خارج قطع.

ويلزم السارق مع / القطع ردّ السرقة ان كانت باقية، وان تلفت لزمه ٩٤
غرمها ان كان موسرا الى حين القطع. واذا أقرّ العبد بالسرقة لزمه القطع
ولا يلزمه غرم السرقة[7] ان تلفت. وكذلك حكمه في كلّ ما يقرّ به ان كان

١ من : — م ٢ حارس : حارص م ٣ المميز : الموميين م ٤ دراهم : دراهيم م
٥ جذبه : جبذه ر ٦ رمى : رما ر ، ما م ٧ السرقة : السريقة م

ما يلزمه من الجنايات يرجع الى بدنه فيما دون رقبته لزمه / وان كان يرجع ٩٥
الى المال فلا شيء عليه .

وتثبت [١] السرقة بالشهادة وبالاقرار . فان قال بعد أن أقرّ : لم أدخل الاّ لحاجة ، فلا قطع عليه ويلزمه غرم السرقة ، والله أعلم.

١ تثبت : تثبيت م

باب أحكام التعدّي وما يوجب الضمان

/ ومن مثّل بعبده مثلة من قطع جارحة من جوارحه فانّه يعتق عليه. ومن ٩٦
عضّ يد رجل فسلّ[1] يده فانقلعت أسنانه فعليه الدية على المشهور. وقيل :
لا شيء عليه. ومن نظر الى دار أو موضع من كوّة أو شقّ باب فقصد اليه
شخص ففقأ عينه فالقصاص،/ وان لم يقصده فالدية. ومن أسند جرّة أو نحوها ٩٧
الى باب رجل ففتح الرجل بابه وهو لا يعلم بالجرّة فوقعت وانكسرت أو ذهب ما
فيها ضمن ربّ الباب الجرّة وما فيها. ومن أجّج[2] نارا على سطح في يوم ريح
فاصابت النار شيئا فالضمان عليه. ومن / أطلق نارا في أرضه ليحرق ما ٩٨
من التبن أو الشوك أو نحوهما فتعدّت الى أرض جاره القريبة منه بنفسها أو
بريح وهو غير آمن أن تصل الى جاره فالضمان عليه فيما أتلفت من الأنفس
والأموال. وكذلك الحكم فيمن أرسل من / أرضه ماء فأصاب مالا أو نفسا الاّ ٩٩
أنّ النفس الواجب عليه فيها الدية على عاقلته الاّ أن يتعمّد فعليه القصاص.
ومن شكا برجل الى السلطان وهو يعلم أنّه اذا أوصله اليه يأخذ منه مالا،
فان كان مظلوما في شكواه / محقّا في دعواه فلا غرم عليه لما أخذه السلطان ١٠٠
لأنّ الناس انّما يلجأون في مظالمهم الى السلطان أو من ينوب عنه، وذلك أمر
لا بدّ لهم منه، وكذلك لا غرم عليه فيما أخذه منه أعوان السلطان. واذا
صال انسان على غيره يريد أخذ / ماله أو قتله أو قتل أهله أو ولده أو ١٠١
أحد ممّن يدفع عنه فانّه يجوز له دفعه ومقاتلته بأيّ وجه أمكن، فان لم
يمكنه الاّ بالقتل قتله ولا شيء عليه، وذلك بعد انذاره[3] وزجره ان كان
عاقلا وبعد الشكاية الى السلطان ./ وان كانت بهيمة أو انسانا مجنونا ١٠٢
أو صغيرا فكذلك أيضا بعد انذار[4] مالك البهيمة أو وليّ المجنون والصغير
ورفعه الى السلطان، وسواء اتّخذ البهيمة الصائلة صاحبها في موضع يجوز له
اتّخاذها فيه أو لا.

١ فسلّ : فشل م   ٢ اجّج : اجح م

٣ انذاره : اذانه م   ٤ انذار : اذان م

ومن باع حرّا كلّفه السلطان / بطلبه والبحث عنه فان أيس منه أعطى ١٠٣
ديته . وإذا ادّعى الصانع أنّه سرق له من حانوته أو منزله ما كان يصنعه من حوائج الناس فعليه اثبات دعواه أنّه سرق ذلك الشيء بعينه من موضعه ،
وان لم يثبت ذلك فان علم سرقة حانوته / واشتهر حلف أنّ ذلك الشيء من ١٠٤
جملة ما سرق له ان كانت عادة الصنّاع يتركون متاع الناس في حوانيتهم ، وان كانت العادة نقل ذلك من الحوانيت فانّهم يضمنون لتفريطهم .

وذكر الامام المازري انّه لمّا وقع له مثل ذلك سنة ثمانين واربعمائة
حين / فتح الروم المهدية ونهبوا الأموال منها كثرت الخصومات مع المرتهنين ١٠٥
والصنّاع ، وفي البلد [1] مشايخ من أهل العلم متوافرون فأفتى جميعهم بتكليف الصنّاع والمرتهنين البيّنة أنّ ما عندهم من متاع الناس نهبه الروم وأخذوه .
/وأفتيت أنا بتصديقهم . قال : وكان القاضي يعتمد على فتواي حينئذ ثمّ ١٠٦
توقّف لكثرة من خالفني من العلماء حتّى بلغه أنّ السيوري أفتى بما أفتيت به .

والحكم في دعوى الاحتراق مثل دعوى السرقة اذا لم يبق من الثياب التي
/ احترقت شيء، وأمّا ان بقي منها شيء فالصنّاع مصدّقون على ما قدّمنا . ١٠٧

وما أتلفه الصبيّ الصغير المميّز أو غصبه أو كسره أو أفسده فيلزم الغرم من ماله ان كان له مال ، وظاهر المذهب أنّه يؤدّب على سبيل الأولى وان
غرم كالبالغ ، وقيل : لا أدب عليه ، وأدّب / باجتهاد الامام [2]، وقيل : ١٠٨
كما يؤدّب في المكتب ، ولا غرم عليه فيما أتلفه من ثمن ما باعه . واختلف في غير المميّز، فقيل : كالمميّز فيكون المال في ماله والدم على عاقلته وهو
المختار. وقيل : لا يلزمه شيء فيكون الدم [3] هدر / والمال كذلك. وقيل : ١٠٩
المال هدر والدم على عاقلته كالمجنون يلزمه .[4]

١ البلد : البلاد م ٢ الامام : الايمام م

٣ الدم : + على عاقلته (—) ر ٤ يلزمه : كذا + ———

واختلف في الحدّ الذي هو به غير مميّز، فقال ابن القاسم : ابن ستّة أشهر، وقال غيره : وابن سنة ونصف . واشترط ابن القاسم أن يكون ممّن لا ينزجر اذا زجر.

والخاتن / اذا ختن صبيّا فأصاب الصبيّ آفة أو هلاك فان كان عارفا فلا ١١٠
ضمان عليه . وكذلك كلّ من فعل فعلا على وجه يجوز له فتولّد منه هلاك أو
تلف مال فلا ضمان عليه . وكذلك الحاكم والجلّاد ونحوهما [١] على ما نذكر بعد
هذا / ان شاء الله تعالى . ١١١

١ نحوهما : نحوها م

باب ما يلزم في القذف

وهو أن ينسب شخص غيره الى الزنى أو اللواط أو ينفيه عن أبيه أو جدّه
وهو من حقوق الآدميين على المشهور، فيجوز العفو قبل الوصول الى السلطان وأمّا
بعد الوصول الى السلطان فلا / يقبل منه العفو الاّ اذا علم السلطان أنّه أراد ١١٢
بذلك الستر، وسواء كان الحقّ لمن قام به أو لأبيه أو جدّه أو لمن تلحق به
المعرّة .

فمن قذف غيره فان كان حرّا بالغا عاقلا ضرب ثمانين سوطا وان كان
عبدا مسلما جلد أربعين جلدة [1] وان كان كافرا حرّا / فعن مالك أنّه يجلد ١١٣
ثمانين كالمسلم وان كان كافرا عبدا جلد أربعين. وقال غيره من أهل
المذهب : لا يلزمه هذا الحدّ سواء كان حرّا أو عبدا ، والواجب عليه من
العقوبة ما يراه السلطان بقدر جرمه حتّى ينكّل به أمثاله وينزجر [2] هو وغيره ،
ويشترط / في المقذوف أيضا أن يكون حرّا مسلما بالغا عفيفا محصنا معلوما ١١٤
بالصيانة .

ومن قال لامرأة : زانية ، وهي صغيرة لا تطيق الوطء فلا شيء عليه .
/وكذلك الصبيّ الصغير الذي لا يستطيع الوطء . ومن قال لشخص : يا ابن ١١٥
اليهودي أو يا ابن النصراني ، وكان في أبائه من هو يهودي أو نصراني فلا
شيء عليه . ومن نفا رجلا من العرب عن نسبه فعليه الحدّ، وان كان من العجم
أو من البربر فلا حدّ عليه لأنّ العرب تحفظ أنسابها. وكذلك ان قال له :
ما لك أصل ولا فصل ./ ومن قال لرجل : يا سارق أو يا قرّان أو يا مأبون ١١٦
أو يا مخنّث أو يا قطيم ، وهو ليس كذلك فعليه الحدّ . ومن قال لرجل :
يا زان ، ولا ذكر له أو لا يقدر على الوطء فلا حدّ عليه . وليس على من قال
لغيره : عار ابن عار أو يا كلب أو يا حمار أو يا فاسق أو / فاجر أو ١١٧
يا ابن [3] الفاجرة ، سوى الأدب باجتهاد الامام بحسب ما يراه من العقوبة في
حقّه .

١ جلدة : ـ م ٢ ينزجر : ينجزر م ٣ ابن : بن ر

باب حكم تارك الصلاة والصيام والحجّ ومانع الزكاة

ومن ترك الصلاة طولب بفعلها وايقاعها في وقتها، فان صلّاها / برئ وان ١١٨
أبى منها وقال : لا أصلّي[1]، ولم يصلّ أخّر الى آخر الوقت الضروري وهو وقت
قرب الغروب في الظهر والعصر وقرب طلوع الفجر في العشاءين وقرب طلوع الشمس في
الصبح فان لم يصلّ حينئذ قتل بالسيف حدّا على المشهور ، ويغسل / ويكفّن ويصلّى ١١٩
عليه ويدفن في مقابر الاسلام. وقال ابن حبيب : يقتل كفرا كجاحدها بأن
يقول : لا صلاة أو ليست بفرض ، فلا يغسل ولا يكفّن ولا يصلّى عليه ولا يدفن
في مقابر المسلمين . وان قال : أصلّي، ولم يفعل فانّه يقتل على المشهور.
وقال ابن حبيب : / لا يقتل . ١٢٠

ومن أفطر في نهار رمضان بحلال أو حرام لغير عذر فعليه العقوبة الشديدة باجتهاد الامام ما لم يكن جاحدا لوجوبه أو يقول : لم يفرض رمضان أو لا صيام ، أو ينتهك حرمة الشريعة ويحتقرها فانّه يقتل كفرا.

ومن ترك الحجّ فلا/شيء عليه لاختلاف الناس فيه هل هو واجب على الفور أو ١٢١
على التراخي الّا ألّا يعتقد وجوبه فيتركه لذلك ويأبي منه فانّه يقتل .

ومن لم يخرج زكاة ماله أخذها منه الامام قهرا وكرها وتجزيه على
الصحيح،/ فان اجتمع على منعها طائفة قاتلهم عليها ويأخذها منهم ولا يسبي ١٢٢
لهم ذرّيّة الّا أن جحدوا وجوبها فيحكم فيهم بحكم الكفّار.

ومن طلبت منه الزكاة وقال : قد أدّيتها فانّه يصدّق ولا يعرض له .
والله سبحانه أعلم

١ أصلي : صلي م

باب ما يلزم من سبّ الله تعالى أو الأنبياء أو الملائكة عليهم السلام أو الصحابة باجماع العلماء

اعلم أنّ من سبّ الله تعالى من المسلمين فهو كافر باجماع العلماء ، ولا يستتاب ولا تقبل توبته . هكذا قال ابن القاسم ورواه عن مالك وقال به كثير من العلماء. فيكون حكمه حكم الزنديق الاّ أن يخلع الاسلام من عنقه ويعمر دينا غيره والعياذ بالله ، فحينئذ يستتاب [1] فان تاب ورجع [2] للاسلام قبلت توبته وأقيل ، وان أبى قتل كالمرتدّ، وان قال : ما وقع منّي من السبّ كان غلطا لا قصدا ،فأفتى الشيخ أبو محمّد بن أبي زيد في مثله بالقتل وعدم قبول قوله وتوبته .

وأمّا من سبّه تعالى من الكفّار بغير ما كفروا به ممّا هو دينهم ومعتقدهم الذي عاهدوا عليه كزهو [3] الصحابة والشرك [4] تعالى الله عن ذلك فانّه يقتل ولا يستتاب ولا تقبل توبته في قول مالك . وقال ابن القاسم : الاّ أن يسلم طائعا غير مكره . وان سبّه بما كفر به كقولهم : انّه لم يرسل الينا محمّدا وانّما أرسله الى العرب ، فلا يقتل ، وقيل : يقتل لأنّه نقض العهد الذي عليهم لأنّا لم نعاهدهم الاّ على أن ‹لا› يظهروا لنا شيئا من كفرهم وأن لا يسمعونا شيئا منه .

ومن سبّ رسول الله صلّى الله عليه وسلّم من المسلمين أو عابه أو تنقّصه وآذاه فانّه يقتل حدّا ولا يستتاب ولا تقبل توبته ولا رجوعه ، ويرثه ورثته ، هذا مشهور من مذهب مالك وأصحابه وقول السلف وجماهير العلماء . وقيل انّ الامام مخيّر في قتله أو صلبه وما أحقّه بأعظم من ذلك .

وقد أمر فقهاء الفيرا ‹بقتل› ابراهيم الفزار الشاعر وصلبه لما أصدر

١ يستتاب : — م ٢ ورجع : برجوعه م

٣ كزهو : كرهوا (؟) ر م ٤ الشرك : الشريك ر م

منه سقم من عيب [١] رسول الله صلّى الله عليه وسلّم فقتل وطعن بالسكّين وصلب ... ثمّ [٢] أنزل وأحرق بالنار. وقال القاضي أبو الفضل عياض : وحكى بعض المؤرّخين أنّه لمّا رجعت خشبته وزالت عنها الابرة استدارت وتحوّلت عن القبلة [٣] وكان عاينه جمع كبير من الناس [٣] وجاء كلب يولغ في دمه، فقال يحيى بن عمر: صدق رسول الله صلّى الله عليه وسلّم وذكر حديثا عنه عليه الصلاة والسلام أنّه قال : لا يلغ الكلب في دم مسلم فيقتل .

وقد أتبعت [٤] هذه القضية [٥] حكاية عظيمة فيها عبرة للمعتبرين ذكرها ابن القاسم القشري أو غيره والله أعلم، وهي : انّ رجلا وقرا من الأولياء الصالحين ومن أهل المراقبة والخشية والمكاشفات كان له ديوان [٦] يكتب فيه ما يقع منه من الحسنات والسيّئات في كلّ يوم وليلة. فدخل يوما الحمام في وقت خلوة فوجد ذمّيّا قد سبقه ومعه رجل مسلم من خدمة الحمام يناوله الماء ويغرف له ويمد ... وكان اسم ذلك الخديم محمّد. [٧] فظلّ الذمّيّ يكرّر الصيحة [٧] عليه والنداء له ويقول المرّة بعد المرّة يا محمّد حكّ أقدامي ، يا محمّد ناولني الماء ، يا محمّد افعل كذا، يا محمّد افعل كذا. فأوقع الله تعالى غيظا [٨] في قلب الوليّ من ذلك القول الذي تكرّر من الذمّي انّما يقصد به امتهان [٩] اسم النبيّ صلّى الله عليه وسلّم وتمثيل [١٠] شخصه الكريم بمنزلة [١١] ذلك الخديم فبقي متحيّرا الى أن صمّم [١٢] وعزم ‹في› قلبه [١٣] على أنّ ذلك كاف [١٤] فلم يملك صبرا حتّى قام الى آنية من أواني الماء فملأه بالماء المسخّن الشديد الحرارة ورفع به يده قدر طاعته وضرب به دماغ [١٥] الذمّيّ وهو مستلق على قفاه حتّى سال دمه [١٦] وسال على أنفه وحلقه ، فأخذ الوليّ عند ذلك ثيابه وخرج مسرعا الى منزله، فأراد [١٧] كتب هذا الفعل مع الحسنات في الديوان على عادته في كتاب كلّ ما يصدر منه [١٨] فعل أو قول . ثمّ انّه ندم [١٩] على فعله

١ :=: ٢ ثم : احرق + م ٣ :=: ٤ :=: ٥ القضية : كذا م (القصة ؟)

٦ ديوان : كتاب + م ٧ :=: ٨ :=: ٩ امتهان : (ح) ر ، امنهما م

١٠ تمثيل : + ليلا (؟) م ١١ بمنزلة : (ح) ر ، منزلة م ١٢ صمّم*: صح م

١٣ قلبه : قبله م ١٤ كاف*: كماض (؟) م ١٥ دماغ: (ح) ر ، لدماغ م

١٦ دمه : دماه م ١٧ فأراد: فعل + م ١٨ منه : منهم م ١٩ ندم: (ح) ر ، قدر م

ورأى أنّه فعل ما لا يحلّ له لأنّ الشريعة لم تحكم بذلك ولا بمثله الاّ بعـــد التحقيق ، فبقي [1] يومه ذلك متحيّرا لا يدري [2] كيف يكتب الى أن عزم [3] علـى كتبها سيّئة . فلمّا أخذ الكتاب ليكتبها مع السيّئات وجد السيّئات كلّها التي كانت في الديوان قد محيت ولم يبق فيه الاّ الحسنات فلذلك [4] فرح وسرّ ســرورا عظيما وكتب حسنة .

ومن سبّه صلّى الله عليه وسلّم من الكفّار بغير ما كفر به مثل أن يكذّبه فعن مالك أنّه يستتاب فان تاب وأسلم ترك [5] ونكل وان أبى من [6] ذلك [7] قتل. وعنه أيضا أنّه يقتل من غير استتابة،وهو الحنان . وأمّا [8] من سبّه بمثـل ما كفر به هو كقوله هو للعرب فلا شيء عليه ويؤدّب على ذكر ذلك ، وقيـــل يقتل . وحكم من سبّ الأنبياء عليهم السلام أو تنقّصهم كحكم [9] من سبّه صلّى الله عليه وسلّم ، وكذلك الملائكة عليهن السلام . وأمّا من سبّ الصحابة رضي الله عنهم فمشهور من مذهب مالك أنّ الامام مجتهد في عقوبته وينكله النكال الشديد ويؤدّبه الأدب الموجع الاّ أن ينسبهم الى الضلال فانّه يقتل ، وكذلك حكم زوجاته وآله صلّى الله عليهم وسلّم تسليما.

(كمل بحمد الله وحسن عونه صحّ من خطّ مؤلّفه رحمه الله .) [10]

١ فبقي : فبوقي م   ٢ يدري : يدر م   ٣ عزم : زعم م

٤ فلذلك : فكذلك م   ٥ ترك : (ح) ر ، ترد م   ٦ من : — م

٧ ذلك : ايضا + م   ٨ واما : ان + م   ٩ كحكم : حكم ر

١٠ (كمل — الله) : — ر

بـاب حكم الردّة

الردّة هي الكفر بعد الاسلام والعيـاذ بـالله . فمن كفر بعد اسلامه من غير
عذر اكراه فهو مرتدّ، يستتـاب ثلاثة أيّام فـان تـاب والاّ قتل ، ولا / يغسل ١٢٤
ولا يكفّن ولا يصلّى عليه وتستر عورته ويوارى بـالتراب في غير مقابر المسلمين،
ولا يرثه ورثته [1]، ويكون ميراثه لبيت المال . وسواء كان كفره بصريح
القول كقوله هو كافر بالله ورسوله أو كان بغير صريح القول كجحده للصلاة
/ والصيام وغيرهما من شرائع الاسلام وممّا علم من الدين ضرورة ، وكاعتقاده ١٢٥
التأثير للنجوم ، أو كان بفعل كالقاء المصحف في القاذورات وكشدّ الزنّار وهو في
بلد الاسلام وكالسجود للصنم نعوذ بالله / من ذلك ونسأله الختم بالحسنى والعصمة ١٢٦
من خواتم الأشقياء .

واذا كان للمرتدّ ولد صغير فانّه مسلم ولا يلحق بأبيه ، فان ارتدّ مع
أبيه ترك [2] الى البلوغ فان تاب والاّ قتل . وعن ابن القاسم : لا يقتل
اذا بلغ سواء ولد قبل الردّة / أو بعدها. ١٢٧

ومن انتقل من دين كفر الى كفر آخر فالمشهور أنّه لا يعرض له ويترك
لأنّ الكفر ملّة واحدة . وقيل : يقتل لعموم [3] قوله صلّى الله عليه وسلّم : من
بدّل دينه فاقتلوه . وأمّا الزنديق وهو الذي يظهر الايمان للناس ويخفي
الكفر / فانّه يقتل ولا تقبل توبته الاّ اذا لم يعلم به حتّى جاء تائبا ، وكذلك ١٢٨
الساحر اذا كان مسلما ، وأمّا ان كان ذمّيّا فان كان لا يسحر الاّ الكفّار فلا
يتعرّض له بغير الأدب ، وان كان يسحر المسلمين فانّه يقتل لأنّه نقض العهد
بذلك ولا تقبل منه / توبة الاّ أن يسلم . وقال ابن رشد: يقتل ولو أسلم ، ١٢٩
والله أعلم.

١ ورثته : ورثة م ٢ ترك : + اي م ٣ عموم : علو م

بـاب حكم الزنى

ومن زنى من حرّ بالغ عاقل محصن قاصدا الى الزنى رجم بالحجارة حتّى
يموت ، وان كان غير محصن جلد مائة جلدة ، كما قال الله تعالى : الزانية
/ والزاني فاجلدوا كلّ واحد منهما مائة جلدة ولا تأخذكم بهما رأفة في دين ١٣٠
الله . ثمّ ينفى عن وطنه الى بلد آخر يسجن فيه عاما ان كان ذكرا حرّ ،
وان كان عبدا أو امرأة فلا نفي عليهما .

والاحصان هو أن يتزوّج الرجل أو المرأة / تزويجا صحيحا ويكون الوطء ١٣١
وطأ صحيحا ، وسواء كان في حال الزنى متزوّجا أو لا كمن طلق مثلا وبقي بلا
زوجة أو ماتت زوجته ، وكذلك المرأة الاّ أنّ النكاح يكون متقدّما على الزنى .

واذا زنى العبد ضرب خمسين / سوطا ، والذكر والأنثى في الرجم والجلد ١٣٢
سواء .

ومن عمل عمل قوم لوط رجم حتّى يموت أحصن أو لم يحصن الفاعل والمفعول
به اذا كانا بالغين حرّين أو عبدين ، واذا كان أحدهما بالغا رجم البالغ
وزجر غير البالغ بما يليق من الأدب .

/ ويثبت الزنى بالاقرار طوعا من العاقل البالغ أو بالحمل في غير المتزوّجة ١٣٣
البكر أو بشهادة أربعة رجال أحرار بالغين عدول يرونه يزني كالمرود في
المكحلة ، فان لم تكن الشهادة كذلك أو لم يتّفق الأربعة شهود على وصف الشهادة
فلا شيء / عليه ، ويحدّ من الشهود من لم يتمّ الشهادة على شرطها المذكور. ١٣٤

وعلى المرأتين معا في المساحقة الأدب بقدر اجتهاد الامام ، ولا ينتهى
بهما الى المثلة بقطع جارحة ونحوها . وقد أفتى بعض فقهاء تونس سلطان

/ الوقت حينئذ في ذلك اذ أعياه أمرهنّ بكثرة ذلك الفعل في داره وأعيـــــاه ١٣٥
الأدب والضرب والسجن بأنّه يكبلهنّ بقيد ضيّق جدّا لا تكاد المرأة أن تفتح رجليها
به ففعله بكلّ من يفعله عنده من النساء فانقطع ذلك الفعل / فاستحسنه السلطان ١٣٦
والفقهاء . وقال أصبغ تضرب كلّ واحدة من الفاعلتين معا خمسين سوطـــــا .
والاجتهاد هو الصواب .

باب ما يلزم في الشرب

واذا شرب المسلم الحرّ البالغ العاقل خمرا أو نبيذا مسكرا / من أيّ نوع ١٣٧
كان من الأشربة قليلا أو كثيرا فعليه الحدّ ثمانون سوطا سكر أو لم يسكر ،
ولا نفي عليه. وان كان عبدا جلد أربعين سوطا. والذكر والأنثى ســواء.
وكلّ ما أسكر كثيره فقليله [1] حرام يوجب من الحدّ ما يوجبه الكثير.

ولا حدّ / على مكره على الشرب ولا على مضطرّ الى شربها، كمن غصّ بلقمة ١٣٨
ولم يجد ماءا و خاف الموت ، ولا على من شربها لجوع أو عطش شديدين يخاف
الهلاك بسببهما على قول ابن العربي ، ولا على من شرب شرابا يظنّه غير مسكر.

ولا / يجلد السكران حتّى[2] يصحو من سكره. واذا جلد فالمشهور أنّه يطاف ١٣٩
به في الأسواق ثمّ يسجن ، والله أعلم.

١ فقليله : وقليله م   ٢ حتى : — م

باب كيفيّة اقامة الحدود

قال علماؤنا رضي الله عنهم : لا يجوز للسلطان أن يمكّن المجنيّ / عليه ١٤٠
من القصاص الاّ في النفس ، فانّ له أن يدفع اليه القاتل ليقتصّ منه . وقال
أشهب : لا يمكّنه لا في النفس ولا في غيرها . وانّما يكون القصاص بأمر السلطان
فلو تعدّى وليّ الدم ونحوه واقتصّ بغير أمره عاقبه على ذلك سدّا / للذريعة ١٤١
وحماية من أن يتعدّى بعض الناس على بعض . وكذلك الحدود غير القصاص ، لا
يقيمها الاّ السلطان أو من يقيمه هو لذلك من الأمراء وقضاة الأمصار ونحوهم ،
حتّى الزوج في زوجته والسيّد في عبده الاّ في حدّ الخمر / والزنى والقذف خاصّة ، ١٤٢

فانّهم أجازوا [١] للسيّد أن يقيمها على عبده أو أمته [٢] دون السلطان . وأمّا
السرقة والقتل وسائر القصاص فلا يقيمها الاّ السلطان كالحرّ لا يقيم عليه الحدّ
أو سائر العقوبات والزواجر الاّ السلطان / سواء كان الحقّ في الجناية لله أو ١٤٣
للآدمي . واذا جنى العبد جناية من حقّ الله أو حقّ آدمي وهو متزوّج لحرّة
أو لأمة مملوكة لغير سيّده فلا يقيم الحدّ عليه الاّ السلطان ، وكذلك الأمة
المتزوّجة لحرّ أو لعبد مملوك لغير سيّدها .

/ والحدود التي هي بالضرب لا تصحّ بقضيب ولا درّة وشبههما ، وانّما تصحّ بسوط ١٤٤
معتدل في الكبر والصغر لا عقد في رأسه وبضرب معتدل موجع مؤلم اذ لا يجوز
ضرب بغير ايجاع ولا ايصال ألم للمضروب ، / والشيخ والشابّ والمرأة في ذلك ١٤٥
سواء . قال الله تعالى : ولا تأخذكم بهما رأفة في دين الله . ويكون
المضروب قاعدا مكشوف الظهر والكتفين مستور العورة . فان ضرب في غير الظهر
فلا يجزىء ويعاد الحدّ عليه في الظهر ، / ولا شيء على الحاكم في ذلك . ولا ١٤٦
يربط ولا يقيّد الاّ اذا كان يضطرب اضطرابا يمنع من تمكّن الضرب في محلّه
أو خيف أن يهرب . ولا تكشف المرأة ويبقى عليها من الثياب ما لا يصق
جسمها ولا يمنعها / من ألم الضرب . واستحسن مالك رضي الله عنه أن تجلس ١٤٧

١ أجازوا : اجاز م   ٢ أمته : امرأته م

في قفّة لأنّه أبقى لسترها .

ولا يجوز للسلطان أن يعفو عن من بلغه في حدّ من الحدود ولا أن يقبل شفاعة أحد [١] فيه ولا أن يقيم الحدّ على الوضيع دون الرفيع بل عليه ان يقيمه
على / من وجب عليه ولو كان شريفا هاشميّا . وقد قال صلّى الله عليه وسلّم ١٤٨
لأسامة بن زيد حين شفع له في المرأة التي سرقت وأمر صلّى الله عليه وسلّم بقطع يدها : يا أسامة أتشفع في حدّ من حدود [٢] الله ، انّما أهلك من كان
قبلكم أنّهم كانوا / اذا سرق فيهم الشريف تركوه واذا سرق فيهم الضعيف ١٤٩
أقاموا عليه الحدّ، وأيم الله لو أنّ فاطمة بنت محمّد سرقت لقطعت يدها . وقد أقام أبو بكر — وقيل عمر — رضي الله عنهما الحدّ على ولده وعثمان على أخيه لأمّه .

/ ولا قصاص ولا حدّ على حامل حتّى تضع ، ولا على مرضع حتّى تفطم ، ولا على ١٥٠
مريض حتّى يستريح ، ولا على من غاب عقله حتّى يرجع اليه ، ولا في شدّة الحرّ ولا في شدّة البرد الاّ القتل فلا يتّقى فيه حرّ ولا برد.

ولا يقدّم / السلطان للقصاص الاّ العدل العارف التقيّ سيّما في الجراح فانّه ١٥١
يجب أن يكون ماهرا بالصناعة . وله أخذ الأجرة على ذلك من المجنيّ عليه على المشهور ، وقيل : له أخذ الأجرة من الجاني ، واختاره بعضهم . وقد
كان في زمن الصحابة / رضي الله عنهم ومن قبلهم من السلف الصالح لا يتولّى ١٥٢
اقامة الحدود والقصاص الاّ أهل الدين والمروءة ، وربّما تولاّه الخلفاء والأمراء منهم رضي الله عنهم الاّ أنّه في زماننا وما والاه صار عيبا ومعرّة لا يتولاّه
الاّ أخسّ / الناس وأرذلهم . ١٥٣

١ أحد : — م ٢ حدود : دون م

بـاب من تتوجّه عليه الدعوى بهذه الجنايات ومن لا تتوجّه عليه

اعلم أنّ هذه الموجبات ان كانت الدعوى بها ببيّنة عادلة أو بغيـر
١٥٤ العدول ممّا لم يبق معه للمدّعى عليه حجّة ولا مدفع بأيّ وجه كان / فلا شكّ في
توجّهها وثبوتها [1] على المدّعى عليه بها، وان كانت باقرار المدّعى عليه فانّه
أيضا يثبت ثبوتا أقوى من البيّنة، لقوله صلّى الله عليه وسلّم : أحق ما
١٥٥ يؤخذ به المرء اقراره على نفسه، اذا كان عاقلا بالغا طائعا غير مكره،/فان
أقرّ مكرها بضرب أو قيد أو سجن أو تهديد أو تخويف محقّق لم يلزمه شيء ممّا
أقرّ به الاّ أن يتمادى على اقراره ولم يرجع، فانّه يترك في السجن حتّى يكشف
السلطان عن أمره. فان أمن من الضرب وما أكره به وبقي متماديا على اقراره
١٥٦ / وأتى بما يعرف به صدقه مثل أن يعيّن السرقة أو المقتول أو نحوهما فانّه
يلزمه ما أقرّ به ويؤخذ به. ولو أخرج السرقة أو القتيل في حال التهديد
والضرب فلا يلزمه شيء الاّ أن يقوم دليل على صحّة اقراره أيضا. قاله ابن
١٥٧ القاسم./ وقال مالك : اذا أخرج السرقة يقطع، واذا أخرج القتيل يقتل، الاّ
اذا قال : انّما فعلت ذلك خوفا أو لشدّة ألم الضرب. وقال سحنون : من
حبسه السلطان وأقرّ في السجن فان كان من أهل الصدق والعدل أخذ باقراره وليس
١٥٨ من حبس في حقّ أو باطل سواء. وعنه / أيضا أنّه يلزمه اقراره سواء كان
عدلا أو غير عدل لأنّ أهل السوء لا ينقادون [2] للحقّ الاّ بالتعزير والتخويف. قال :
ولا يعرف هذا الاّ من ابتلي بالقضاء.

وأمّا من ادّعي عليه بدعوى من هذه الدعاوي ولم تقم عليه بيّنة ولم
١٥٩ يقرّ فان كان / في القتل والدعوى من المقتول أخذ وتوجّهت عليه ولو كان مثل
عمر بن عبد العزيز. وان كان في غيره كدعوى السرقة ونحوها فان كان المدّعى
عليه صالحا مشهورا بالخير ممّن لا يختلف في عدالته وورعه وأمانته اثنان
١٦٠ / فلا تسمع هذه الدعوى ولا تتوجّه ويؤدب من رماه بها. وان كان ممّن يتّهم
حبس بمجرّد الدعوى وسجن وأطيل حبسه والتضييق عليه بقدر قوّة التهمة فيه.

١ ثبوتها : ثوبتها م ٢ ينقادون : ينفذون م

قال مالك فيمن ادّعي عليه بدم ووقعت عليه التهمة ولم يتحقّق / عليه ١٦١
ما تجب فيه القسامة أنّه يسجن السجن الطويل ولو أتت عليه السنون الكثيرة.
قال : ولقد كان الرجل يحبس بالشبهة في الدم حتّى أنّ أهله ليتمنّون[1] له الموت
من طول حبسه. وقد نصّ أهل المذهب على أنّ من أخذ أموال الناس[2] وجلس
يتجر بها ثم ادّعى العدم وتلف أموال الناس[2] ولم يظهر ما يصدّقه / مثل ١٦٢
احتراق منزله أو سرقته أو نهبه أو نحو ذلك فانّه يسجن حتّى يردّ أموال
الناس أو يموت في السجن. قال سحنون : ويضرب بالدرّة المرّة بعد المرّة ولو
أدّى الى اتلاف نفسه حتّى يردّ أموال الناس، والله أعلم.

١ ليتمنّون : يتمنون م ٢ وجلس ـ الناس : (ح) ر

باب في التعزيرات

/ اعلم أنّ جميع ما تقدّم انّما هو فيما جعل له الشرع حدّا ورتّب عليه ١٦٣
عقوبة . وأمّا ما لم يحدّ له الشرع حدّا معلوما ولا رتّب عليه عقوبة فانّ
النظر في تلك العقوبة مقصورا على نظر الامام ويرجع الى اجتهاده وما يراه
/ على حسب الحال في تلك الجنايات من العقوبة الشديدة أو الخفيفة أو العفو أو ١٦٤
المسامحة والغفلة من أوّل بقدر الجناية وقدر فاعلها ومن فعلت به وبقدر القول
والقائل ومن قيل فيه وسواء كان الحقّ في ذلك لله تعالى كالأكل في نهار
/ رمضان وشبهه أو كان حقّا لآدمي كالشتم والضرب ونحوهما ، مع أنّه ما من ١٦٥
حقّ آدمي الاّ ولا يخلو من حقّ الله سبحانه لأنّ من حقّ الله تعالى على عبده
ترك الاذايات والاضرار ، فلذلك كان الامام لا يجوز له أن يعذر أحدا ممّن
وقع / في جناية بجهل بل يوقع الحكم في الجاني على حسب نظره وظنّه ، ففي ١٦٦
ذلك زجر للغير من أهل الدعارات والشرور والمفسدين ألاّ يقعوا في مثل تلك
الجناية التي وقعت عليها العقوبة بفاعلها ، وهذا ممّا يختصّ به الأئمّة
الخلفاء أو من يقيمونه / لذلك ونظرهم فيه أقوى من نظر القضاة فانّ السلطان ١٦٧
يباح له من أعوانه وأمرائه وعمّاله سماع قذف المتّهم من غير تحقيق للدعوى
ويرجع الى قولهم وما يتلقّاه منهم في الأخبار عن أحوال الناس وما هم
عليه ليكون على بصيرة ومعرفة / بأهل الريب وأهل الصيانة والعفاف فيعاقب ١٦٨
كلاّ بما يليق به لما يحصل له من العلم ، ويجوز للسلطان أيضا أن يأخذ
المتّهم بما يراه عليه من الدلائل وقرائن الأحوال وما يتحلّى به من الزيّ
وشبهه مثل ما يتحلّى به المتصنّعون / للنساء والباحثين على الأولاد وكالذين ١٨٥
جرت عادتهم بالجلوس في الطرقات لذلك ومثل لباس أهل السرقة والحرابة ، ويجوز
له أيضا ضرب المتّهم أوّل مرّة وحبس أهل الدعارة وسجنهم الى أن يموتوا وأمور
كثيرة لا يسوغ للقاضي / النظر فيها فانّ نظر السلطان أعمّ من نظر غيره من ١٨٦
الولاة والحكّام .

فمن جنى معصية لا حدّ فيها من حقّ الله أو من حقّ الآدمي فانّه يجب على
السلطان زجره وتعزيره عليها باجتهاده فيخفّف عن ذي المروءة اذا وقعت منه
الفتلة / أو الزلّة الواحدة ويشدّد على أهل الشرّ والفساد وان رأى العفو جاز ١٦٩
له الاّ في حقّ الله . فيسجن ان شاء أو يضرب أو يأمر أن يطاف به أو يأمر
بقيامه من بين الناس ان كان جالسا بين يديه أو ينزع عمامته أو يعنّفه
ويوبّخه ولو بالسبّ / الذي لا حقّ فيه عليه أو يعرض عنه أو غير ذلك ممّا لا ١٧٠
يختصّ بنوع [1] من أنواع العقوبات بل على حسب المقام كلّ على قدر حاله وقدر
الجناية . فاذا أساء الأدب الدنيّ المنزلة الشرير على ذي المنصب والهيئة
كانت / العقوبة عليه أشدّ واذا صدر مثل ذلك من ذي المنصب الى من هو دونه ١٧١
كان حاله أخفّ على ما أشار اليه ابن رشد ، ولا ينتهى بذي الهيئة الى
السجن الاّ فيما يستحقّه به .

ويجوز للامام أن يزيد في التعزير على الحدود . قال مطرّف / وابن ١٧٢
الماجشون : يضربه ولو أدى الى موته . وفي العتبية أنّ مالكا بلغه أنّ
رجلا وجد مع صبيّ في سطح المسجد وقد جرّده وضمّه الى صدره ، فأمر أن يضرب
اربعمائة سوط ففعل فانتفخ منها ومات ، فلم يستعظم ذلك مالك بل سرّ به
/ واستنار وجهه . وروي عن أصبغ أنّ أغيا ما تنتهي اليه عقوبة المجرم ١٧٣
في غير الحدود مائتا سوط . وفي الواضحة : ثلاثمائة سوط . وعن ابن
مسلمة : ثمانون . وروى القعنبي : خمسة وسبعون . وقال بعض أهل
الأحكام في مذهب / مالك رحمه الله ما نصّه ، وعن بعض أهل العلم : من شتم ١٧٤
أحدا في مجلس السلطان بما لا يبلغ الحدّ ضربه عشرة أسواط ، ومن سلّ سيفا على
أحد على وجه القتال ضربه أربعين سوطا ويأخذ منه ذلك السيف لبيت المال
/ وقيل انّ من سلّ سيفا على أحد محاربة وجب على الامام قتله . ومن سلّ ١٧٥
سيفا في جماعة يهدّد به على وجه المزاح واللعب ضرب عشرين سوطا ، واذا سلّ
سكّينا للمزاح ضرب أسواطا .

١ بنوع : بنفع م

ومن خالف أمر أمير من أمراء المسلمين أو كسر / دعوته لزمته العقوبة ١٧٦
باجتهاد الامام ، وقيل : من كسر دعوة قاض أو حاكم من حكّام المسلمين
ضرب أربعين سوطا . ومن قال لرجل ليس بظالم يا ظالم ضرب أربعين سوطا
ومن قال لرجل يا مجرم ضرب خمسة وعشرين سوطا ومن قال / لرجل يا سارق ضرب ١٧٧
خمسة عشر سوطا الى عشرين ، ومن سعى الى السلطان بنميمة ضربه مائة سوط
ومن تكلّم في عالم أو وليّ بما لا يليق ضرب أربعين سوطا . واذا ارتفع
الكلام بين الخصمين في مجلس الحكم ضرب كلّ واحد / منهما عشرة أسواط ، ومن ١٧٨
تكلّم في أحد من الناس بما ليس فيه طولب بالبيّنة فان أتى بها والاّ أدّب ،
ومن خالف ما حكم به القاضي عوقب اذا لم يرض بالحكم الاّ أن يتبيّن أنّ القاضي
حكم عليه بالجور فلا شيء عليه .

ومن سرق أقلّ / من ربع دينار أو ما لا قطع [1] فيه أو من غير حرز ضرب ١٧٩
خمسين سوطا ، وقيل : اذا سرق ما لا قطع فيه من الحرز ضرب ستّين سوطا .
وقال بعض أهل الأحكام أيضا : واذا أخذ السارق في المنزل والسرقة مجموعة
بين يديه / ضرب أربعين سوطا ، واذا نقب ولم يدخل ضرب عشرين سوطا ، وان ١٨٠
دخل ولم يسرق ضرب ثلاثين سوطا ، واذا وجد يفتح الأبواب وأخذ قبل فتحها
ضرب عشرة أسواط . ومن تغامز مع امرأة أجنبية أو تضاحك معها ضرب / كلّ ١٨١
واحد منهما عشرين سوطا ، ومن فعل ذلك مع صبيّ أيضا ضرب مثله وزجر الصبيّ .
ومن جسّ امرأة ضرب عشرين سوطا ، فان طاوعته في ذلك ضربت مثله . ومن وجد
في بيت خال مع امرأة وعليهما ثيابهما ضرب كلّ واحد / منهما ثلاثين سوطا ١٨٢
وان كانا متجرّدين من ثيابهما غير مباشرين ضربا أربعين أربعين ، واذا
كانا مباشرين ضربا خمسين خمسين . ومن اتّبع امرأة في طريق يراودها
ضرب ثلاثين سوطا . ومن تكلّم بكلمة قبيحة في أمير / من أمراء المسلمين ١٨٣
لزمته العقوبة الشديدة ويسجن مع ذلك شهرا . ويجب التعزير على من قال
لآخر يا آكل الربا أو يا فاجر أو يا فاسق أو يا حمار ونحو ذلك من الشتم

١ قطع : يقطع م

والسبّ والتعيير.

وللامام أن يعاقب بالنفي مقدار ما شاء ولو سنين / وله أن يضرب فيه ١٨٤
بالسوط والقضيب والعصا وبأكبر من سوط الحدّ. فاذا عفا في التعزير صاحب
الحقّ عن غريمه بعد الوصول الى السلطان فلا يتمّ ذلك الاّ بموافقته ونظره، فامّا
تركه أو عاقبه لأنّه ينظر/ بالأصلح ، فان أراد زجره وزجر غيره وتهذيب ١٨٧
الناس وتقويمهم [1] عاقبه والاّ عفا عنه. وللامام أن يقبل شفاعة من شفع له
فيمن وجب عليه التعزير [2] في حقّ الله .

وليس له أن يعاقب معلّم الصبيان اذا ضربهم الاّ اذا جاوز حدّ الأدب / ١٨٨
وذلك من ثلاثة أسواط الى عشرة أو خمسة عشر على ما حدّده بعضهم، وقيل :
لا يختصّ بتحديد حتّى يجاوز المعتاد فيؤخذ على يديه. وكذلك الأب [3] في ولده
والسيّد في عبده ما لم يخرجا عن المعتاد، وكذلك الزوج / في امرأته ان ضربها ١٨٩
على منعها من حقّه. قال ابن رشد : له أن يضربها على ترك [4] الصلاة.

واذا ضرب السلطان أحدا في تعزير فله أن [5] يضربه في كلّ عضو الاّ الوجه
والمقاتل ويكشفه الاّ ممّا يواري عورته. ولا ضمان على الحكّام / اذا مات أحد ١٩٠
من ضرب التعزير اذا لم يتعمّدوا القتل من أوّل مرّة، الاّ اذا قتله الامام
لمصلحة لأنّهم مأذون لهم في ذلك. وقد قدّمنا أنّ من فعل فعلا مأذونا له
فيه على وجه الصواب فتولّد منه هلاك أو تلف مال / فلا ضمان. هذا مذهب ١٩١
جمهور العلماء. واذا علم السلطان أنّ التعزير لا ينفع ولا ينزجر به الجاني
تركه وسجنه ان كان كبيرا وان كان صغيرا خلّى سبيله.

١ تقويمهم : تقومهم م ٢ التعزير : الا + م

٣ الاب : الا(د —)ب ر ٤ ترك: — م ٥ ان : — م

فصل

وعلى الامام أن يقيم من ينظر / في أمور الناس وأحوالهم ومعايشهم ١٩٢
ويؤدّبهم على ترك التستّر في الحمّامات وعلى [١] الجلوس في الطرقات والتعرّض
لأماكن الريب والتّهم وطرح الأزبال والقاذورات [٢] في الأزقّة [٣] والأسواق ونصب
الميازيب من السطوح التي تضرّ بالمارّة ،/ والتقدّم بالنهي لأرباب الحيطان المائلة ١٩٣
والساباط [٤] الذي يخشى سقوطها وعن ترك المياه تجري في الطرقات وترك الكنف [٥]
منفتحة ،ويزجر [٦] من يسوق الدواب من غير أن يقودها لئلاّ تصيب أحدا وعن
اخراج الأجنحة والرفوف / على الطرق ان منعت جواز الراكبين وكذلك الساباط ١٩٤
وعن تضييق الطرق بالبناء والدكاكين أمام الحوانيت ان أخرجت في الطرق،ويمنع
من اختلاط الرجال بالنساء في مواقف البيع وينهى النساء عن الخروج للمقابر
والجنائز والزيارات / الاّ ليلا ولا [٧] سيّما في وقت غلبة الفساد وخصوصا في ١٩٥
المواسم والأعياد ويعاقب أزواجهنّ ان لم يمنعوهنّ ، ويجعل للنساء سجنا
منفردا بهنّ مع أمينة .

وينهى عن التعامل بالربا وعن كلّ ما منع الشرع منه وان تراضى الناس عليه
وخصوصا / الغشّ وتطفيف المكيال والميزان ونقصهما وعن افساد سكّة السلطان ١٩٦
وعن التعامل بالمغشوش وغير المطبوع بطابع السلطان وان كان التعامل به يجوز
وهو غير مغشوش حسما للذريعة وسدّا لها وصونا لحرمة السلطنة ./ ويعاقب ١٩٧
بأشدّ عقوبة وأعظم نكير من يطبع على طابع السلطان ، ويتفقّد المكيال والميزان
والصنج [٨]، ويهرق اللبن المغشوش ويكسر [٩] الخبز الرديء ويتصدّق به على ما نصّ عليه
بعضهم . وكذلك كلّ ما يغشّ من الأطعمة / وما له حرمة يفسد حتّى لا ينتفع ١٩٨
به ، ويخرق الملاحف والشقق ونحوها التي نسجت على غير وجهها ، وكذلك صاحب
كلّ صنعة .

١ على : عن ر م ٢ القاذورات : القادورات ر ٣ الازقة : الانقة م
٤ الساباط : الصاباط ع ٥ الكنف : الكتب ع ٦ يزجر : منع ع
٧ ولا : لا ع ٨ الصنج : المطبخ ع ٩ يكسر : تكسير ع

ويمنع الناس من أن يتعدّى بعضهم على بعض وعدم التناصف بينهم ومطل[1] الحقوق ، ويردّ القويّ عن الضعيف ./ وينهى البيع والشراء في وقت نداء الجمعة ١٩٩
ويؤدّب المتخلّفين عنها من أهلها.

ويكفّ مضرّة الجيران ويقطع أغصان الشجر المنتشرة على الدور والأزقّة وكذلك الشجر النابت في حريم سور البلد وحفيره[2] ويتعاهد النظر في المساجد والزوايا والأسوار وسائر الأحباس/ الى غير ذلك ممّا لا يحصى ولا يحصر. ٢٠٠

وفيما ذكرنا كفاية وارشاد[3] لمن وفّقه الله تعالى وأمدّه بعونه[3] ،ولا حول ولا قوّة الاّ بالله العليّ العظيم .

١ مطل : فصل ع — ٢ وكذلك — وحفيره : (ح) ر

٣ لمن — بعونه : — ع

بـاب في أحكـام أهل الذمّة

اعلـم أنّـه لا يـلـزمـنـا أن نـتعـرّض / لأهل الذمّة فيمـا بيـنـهـم من الحقـوق ٢٠١
والمطالـب الاّ اذا كانت من التظالـم وممّا لا تجيزه شريعة كالغصب والتعدّي ونحوهما
ممّا هو ظلـم من أحدهم لـلآخر فـانّه لا يسوغ لـنـا حينئذ تركهم عليه بل يجب على
الامام رفعه / والحكم بيـنـهم فيه ، ويتسلّط علـيهم في تغييره وينقر عن صورته ٢٠٢
كيف وقع فيغيّره ويزيله أحبّوا أم كرهوا رضوا أم سخطوا . وأمّا غير
التظالـم مثل نـوازل الأحكام والدعـاوي التي هي [١] مجرّد دعـاويهم [٢] وطلب / لما ٢٠٣
يحلّ وما لا يحلّ ونحو ذلك فليس لـنـا أن نتعرّض لـهم الاّ اذا ترافعوا الـيـنـا
وتراضوا على حكمنـا هم وأحبارهم . عند ابن القاسم : والامام مخيّر أن
يحكم بينهم أو يعرض عنهم ويتركهم الى دينهم وهو المستحبّ . عند / مالك ٢٠٤
رحمه الله : فاذا أراد السلطان أن ينظر في قضيتهم ويحكم بينهم فيهـا
صحّ [٣] ذلك وحكم فيهم بحكم الاسلام في المسلمين . قال الله تعالى مخاطبـا
لرسوله صلّى الله عليه وسلّم : فان جاءوك فاحكم بينهم أو / اعرض عنهم ٢٠٥
وان تعرض عنهم فلن يضرّوك شيئا وان حكمت فاحكم بينهم بالقسط ، انّ الله
يحبّ المقسطين . والصحيح أنّ رضاء الأحبار لا يشترط ، والذي نقل ابن العربيّ
أنّ الذي يخيّر فيه الامام في الحكم بينهم والاعراض عنهم / انّما هو في ٢٠٦
التظالم وهو خلاف ما نقلناه أوّلا . وما نقلناه هو ظاهر المذهب بل نقل
بعضهم : فيه الاجماع ،والله أعلم . فاذا حكّمونا في قضاياهم وحكمنا
بينهم بحكم الاسلام لزمهم ذلك الحكم وليس لهم الاّ الرضاء / به ، فان لم يرضوا ٢٠٧
به ولا بأحكام ملّة الاسلام فقد انتقض عهدهم . وأمّا ما بينهم وبين المسلمين
فلا خلاف أنّ الحكم في ذلك انّما هو بحكم الاسلام وان لم يرض الكافر بالترافع
الينا معه ، والله أعلم والموفّق للصواب بفضله .

/ وهنا انتهى بنا القول فيما وقعت به الاشارة السعيدة ، وكمل الغرض النافذ[٤] ٢٠٨

١ التي هي : هي التي م ٢ دعاويهم : دعاوهم م

٣ صحّ : لصح م ٤ النافذ : النافد ر

بالمقاصد الحميدة ، على أنهج مسالكه الرشيدة ، بطول الله تعالى ومننه العديدة . والله تعالى يجعله له نصره الله جنّة واقية ، وعمدة كافية ، وعدّة / شافية ،ويديم له به سعادة وافية ، وكلمة باقية ، ونعمة صافية ، ٢٠٩
وسترا وعافية ، وبشرا نامية ، وفتوحا متوالية ، وخيرات زاكية ، بجاه مولانا محمّد المخصوص بالرتب العالية ، صلّى الله عليه وعلى آله وصحبه صلاة هاملة هامية ،/وسلّم عليه وعليهم الى يوم الدين ، وآخر دعوانا أنّ الحمد لله ربّ ٢١٠
العالمين .

كمل كتاب بشائر الفتوحات والسعود، في أحكام التعزيرات والحدود، الذي ألّفه باشارة مولانا السلطان الامام أمير المسلمين المتوكّل / على ربّ العالمين ٢١١
مولانا أبي عبد الله ابن امام المسلمين وخليفة الله على عباده المؤمنين المتوكّل على ربّ العالمين مولانا أبي عبد الله محمّد بن مولانا أمير المسلمين (أبي عبد الله محمّد بن مولانا أمير المسلمين) أبي ثابت ،[1]ثبّت الله ملكه وصيّر البسيطة ملكه ، عبد نعمتهم ومملوك خدمتهم عبيد الله سبحانه يحيى بن عبد الله بن أبي البركات خار الله له وزكّى قوله وعمله ، وذلك في أخريّات[1] شهر ربيع الأوّل المبارك عام ثمانية وثمانين وثمانمائة . [2] عرّفنا الله خيره وبركته ، وصلّى الله أوّلا وآخرا على سيّدنا محمّد وعلى آله وصحبه عدد ما ذكره الذاكرون وغفل عمّا ذكره الغافلون . [2]

١ ثبت ـ أخريات : رحمه الله وكان الفراغ منه م

٢ عرفنا ـ الغافلون : ونسخته على يد العبد الذليل المذنب الراجي رحمة مولاه ان شاء الله وكان الفراغ منه أوّل شهر ربيع الثاني في بلدة آسفي آمنه الله وهذا الكتاب هو ملك لنا ولمن شاء الله بعدنا . اللهمّ نفعنا بأجره ومن حكم به ووقف عند حدود ما فيه وسمح الله لنا ولأولادنا ولجميع المسلمين والمسلمات الأحياء منهم والأموات . وكتبناه في أوّل شهر ربيع الثاني سنة أربعة وسبعين بعد الألف على يد العبد المذنب الخاطىء الذليل الراجي رحمة مولاه محمّد بن ابراهيم بن منصور الآسفي دار لطف الله به والجميع (؟) وصلّى الله على مولانا محمد خاتم النبيين وامام المسلمين صلاة عليه وعلى آله . م

Introduction

The starting point of this thesis is the text, Bashā'ir al-futūḥāt wa-al-suʿūd fī Aḥkām al-taʿzīrāt wa-al-Ḥudūd .. Yaḥyā b. Abī al-Barakāt al-Nālī al-Tlimsāmī al-Ghammārī[1]. This text is a practical handbook of the law, according to the Mālikī madhhab, relating not only to the offences and punishments characterised as ḥudūd, but also to a number of other transgressions of what we should now regard as being both the criminal and the civil law. It was written for one ʿAbd Allāh b. al-Mutawakkil ʿala Allāh al-Manṣūr bi-Faḍl Allāh Abū ʿAbd Allāh, who is alleged to have been the last of the Banū Ziyān[2], rulers of Tlemcen 633/1235-796/1393. No such name, however, is given in S. Lane-Poole[3], and it may be that the history of this somewhat obscure section of the Muslim world is still to be correctly worked out.

The principal interest of this short text lies in the fact that it is a practical hand-book[4], compiled, it seems, for the guidance of the ruler in his judicial capacity. The author says: "I collected it (the material on this subject) for him...because of the excessive length of the books of laws and because they do not concern themselves particularly with this subject." (Arabic text 1, 15-16). It defines the offences, specifies the means by which guilt is to be established, sometimes gives examples, and indicates the penalties to be inflicted, where this is appropriate. It does not, however, entirely neglect the theoretical side, since it generally refers to sources and authorities, both the Qur'ānic verses and the Ḥadīths that establish the laws,

and the opinions of the principal Mālikī ʿulamāʾ, when there is disagreement. Reference is also frequently made to 'the generally accepted view' - al-mashhūr/mashhūr al-madhhab.

There are few examples, as far as I know, of such a handbook for a ruler, who, although in theory conversant with the Sharīʿa in all its aspects, might perhaps in practice have a less than complete acquaintance with its provisions. Whether, in fact, at this date, such a ruler would often have exercised his function as a judge in such matters, or whether he would have delegated this, is uncertain. It is not improbable, however, that in a fairly small state he would from time to time have felt an obligation to sit in judgement himself particularly in cases where a ḥadd was involved, since these were traditionally reserved for the ruler. In these circumstances he might well have felt the need of a manual like Bashāʾir al-futūḥāt. It is difficult otherwise to account for the compilation of the work. If it had been produced unsolicited, it might have been considered insulting, as implying a lack of knowledge on the part of the ruler, even supposing the royal dedication to have been purely formal and the intended recipients to have been practising lawyers. The work contains frequent references to the Sultan as the authority before whom matters are brought, and this may well genuinely reflect the ruler's personal involvement in the administration of justice. The balance of probabilities inclines towards the work's being intended for his own use, but, whatever the case may be, it is indicative of the level of general knowledge of the Sharīʿa that there was a need for it.

Rather than a straight translation of the text, a somewhat more systematised paraphrase of the parts of direct relevance to its professed subject has been attempted, with some editorial comments and (sometimes unresolved) queries. Details of cases cited have been omitted, as has the penultimate section, which is concerned with a somewhat odd assortment of matters that the Imām should attend to, from preventing counterfeiting to making sure that those in charge of animals do not allow them to endanger passers-by. This has nothing to do with the real subject-matter of the work; it is, indeed, somewhat surprising that it is included, since most of it can scarcely be regarded as of sufficient importance to be worthy of the ruler's notice.

In this regard, however, it is perhaps possible that the author takes the view that the ruler should be personally responsible for justice, and order, at all levels; this would imply a return to the kind of regime that prevailed at Medina under the Orthodox Caliphs. One would think that such a return could hardly be advocated realistically at this late date, even in a comparatively small state, and that the idea of so doing was merely the sort of dream that Muslim intellectuals indulged in from time to time. Bashā'ir al-futūḥat is, however, quite certainly a practical hand-book, and it may simply be that this section represents miscellaneous notes that the author had not fully worked out, or an interpolation by an editor, a lawyer or a scribe. The title, and the bulk of the contents would lead us to suppose that the author considered the ḥudūd, and more or less related matters, to be the principal judicial concern of the ruler.

The ḥudūd are the corner-stone of the Sharīʿa, at all events, of that part of it that is concerned with offences against man and God. They represent the absolute basic rock of religious morality: those matters concerning which God has spoken, and in the establishing of offence against which the greatest care must be taken, since there can be no remission of sentence, once guilt is proved. The positions of killing and wounding in this respect are anomalous. Although God has pronounced on them, and on the essential penalty that attaches to them, the fact that He has permitted a remission of this penalty means that they are not generally regarded as coming into the category of ḥudūd. Nonetheless, they are frequently dealt with, as in Bashāʾir al-futūḥāt, as having a special relationship with them, probably because of the association of them in the Old Testament with a number of the offences that became ḥudūd in the Shariʿa.

The taʿzīrāt are inevitably associated with the ḥudūd, as being punishments for offences against the interests of the individual or the community, not necessarily of less gravity than the ḥudūd, but on which no divine pronouncement has been made. Frequently they depend, in the first instance, on the sunna of the Prophet, or on decisions of the Orthodox Caliphs, but their principal difference from the ḥudūd, apart from their lack of direct divine authority, lies in the fact that the award rests with the judicial authority. In general, it will be less severe than that of a ḥadd, but this is not necessarily the case. The Prophet is said to have laid down ten lashes as the limit, but there is some dispute about this, and, on the whole, the decision is left to the judge.

The Mālikī madhhab in the Maghrib

The Ḥanafī madhhab was the first to be followed in the Maghrib. Political considerations, however, caused this to be succeeded by the Ibāḍī[1] and subsequently a form of the Shīʿī (under the Fāṭimīds)[2]. Probably these last two never engaged the allegiance of the whole population, or even of all of the fuqahāʾ[3]. The Awzāʿī madhhab[4] was also followed in the Maghrib. According to Ibn Ḥazm, the Mālikī madhhab was imposed by the decree of Hishām b. ʿAbd al-Raḥmān b. Muʿāwiya[5]. No reason is given for this, but it would seem that it was perpetuated by the comparative isolation of al-Andalus and the Maghrib from the Islāmic East. The fact that the Mālikī madhhab was based in the Ḥijāz, which was the most convenient part of the East for students from the Maghrib to visit, since they could combine study residence with the Pilgrimage, made it natural that they should espouse it. The fact that it was based more on the ḥadīth than the previous madhhabs, and the fact that Mālik lived in the principal repository of ḥadīth, no doubt played their parts in ensuring the enduring popularity of this madhhab. The most prominent of the early Mālikī fuqahāʾ in the Maghrib[6] and al-Andalus were the following:

1. ʿAlī b. Ziyād al-Tūnisī, Abū al-Ḥasan, brought the Muwaṭṭaʾ to the Maghrib. He was the teacher of Saḥnūn. He studied under Mālik himself, al-Thawrī, al-Layth b. Saʿd and others. Ibn al-Furāt studied under him. He died in 183/799[7].

2. Ziyād b. ʿAbd Allāh b. ʿAbd al-Raḥmān al-Qurṭubī, Abū ʿAbd Allāh, known as Shabṭūn, was the first to propagate the *Muwaṭṭaʾ* in its complete form. He studied it with Mālik himself; he also met Layth b. Saʿd and Ibn ʿUyayna. He used to travel twice a year to Medina. He died in 193/808[8].

3. ʿĪsā b. Dīnār al-Andalusī studied in Egypt under Ibn al-Qāsim (ʿAbd al-Raḥmān b. al-Qāsim b. Khālid b. Janada al-ʿAtīqī, died 191/806), on whose teaching he greatly relied. He became Muftī of Cordoba. He died in 212/827[9].

4. Asad b. al-Furāt's family came from Nīsābūr; he was born in Baḥrran in the province of Diyarbakr. He grew up in Tunis, where he studied under ʿAlī b. Ziyād. He afterwards went to Medina, where he studied the *Muwaṭṭaʾ* under Mālik, and to Iraq, where he studied with Abū Yūsuf yaʿqūb b. Ibrāhīm and Muḥammad b. al-Ḥasan al-Shaybānī. He was the author of the *Mudawwana*. He died in 213/828[10].

5. Yaḥyā b. Yaḥyā b. Kathīr b. Walas al-Laythī, Abū Muḥammad, was a student of Shabṭūn, and his brother-in-law. He went to the East when he was 28 years old, after having studied under Yaḥyā b. Muḍar al-Qaysī al-Andalusī. He studied under Mālik in Medina and was called by him *ʿĀqil al-Andalus*. He then went to Egypt, where he studied under Ibn al-Qāsim. When he returned to al-Andalus, he refused to accept a judicial post. He became Muftī of Cordoba after ʿĪsā b. Dīnār. He died in 234/848[11].

6. ʿAbd al-Malik b. Ḥabīb b. Sulaymān al-Salamī, was born in Toledo and studied first in al-Andalus. In 208/823 he went to Medina, where he studied under Ibn al-Mājashūn (ʿAbd al-Mālik b. ʿAbd al-ʿAzīz b. Abī Salmā, a close friend of Mālik's, who taught many students in Medina after Mālik's death, died 212/827). On his return to al-Andalus, he lived first in Elvira and was then summoned to Cordoba by ʿAbd al-Raḥmān b. al-Ḥakam. He was the author of the Wāḍiḥa. He died in 238/852[12].

7. ʿAbd al-Salām b. Saʿid al-Tanūkhī, known as Saḥnūn, came from Syria to Cordoba, with his father. His early studies were in the Maghrib. He travelled to the East for his further education, visiting Egypt, Damascus and the Ḥijāz. While in Egypt, he studied with Ibn al-Qāsim, under whose supervision he copied the Mudawwana, and Ibn Wahb (ʿAbd Allāh b. Wahb b. Muslim al-Qurashī, a close friend of Mālik's, died 197/812). When he returned to the Maghrib, he became well-known as a jurist and was asked by Muḥammad b. al-Aghlab to accept a judicial post, which he did, with some reservations. He was then 74 years old and held this post until his death. He taught many students from al-Andalus and elsewhere. He died in 240/854.

Introduction

1. Al-Khizāna al-Malakiyya, Muntakhabāt min nawādir al-Makhṭūṭāt (al-Fiqhiyya), 89.
2. Al-Nāṣirī, al-Istiqṣā', IV, 162.
3. S. Lane-Poole, The Mohammadan Dynasties, 51.
4. Al-Khizāna al-Malakiyya, Muntakhabāt min nawādir al-Makhṭūṭāt (al-Fiqhiyya), 89.

Mālikī Madhhab

1. Arsilān, Maḥāsin al-Awzāʿī, 7-8.

   Ibn ʿArnūs, Tārikh al-qaḍā', 49.

   Manṣūr, ʿAbd al-Wahhāb, Qabā'il al-Maghrib, 114.
2. Ibid., 117.
3. Arsilān, Maḥāsin al-Awzāʿī, 7-8.
4. Ibn ʿArnūs, Tārikh al-qaḍā', 48.
5. Ibn Khaldūn, al-Muqaddima, 392.
6. Abū Bakr, Riyāḍ al-nufūs, I, 158.
7. Al-Khudarī, Tārikh al-tashrīʿ, 180.

   Al-Ḍabbī, Bughyat al-multamis, 280.
8. Al-Khudarī, Tārikh al-tashrīʿ, 180.

   Al-Ḍabbī, Bughyat al-multamis, 178.
9. Al-Khudarī, Tārikh al-tashrīʿ, 181.
10. Ibid., 181.

    Ibn Lubaba said: "Faqih al-Andalus ʿIsā b. Dinār, wa ʿĀlimuhā Ibn Ḥabīb, wa ʿĀqīluhā Yaḥya."
11. Ibid., 183.
12. Ibn Farḥūn, al-Dibāj, 146-147.

Chapter 1

Paraphrase of the Arabic Text

Prescriptions in the case of wounds or destruction of complete members, or part thereof.

1. Prescriptions in case of killing.
2. Details of the _matālif_ and the _diya_.
3. _Ḥarāba/Muḥāraba_.
4. _Al-Baghy_.
5. _Sariqa_ (Theft)
6. Provisions concerning encroachment on the rights of others, and liability.
7. _Qadhf_ (Defamation).
8. Provisions for those who fail to pray, fast, go on the pilgrimage or who refuse to pay _zakāt_.
9. Penalties due, by agreement of the ʿUlamāʾ, for reviling God, the Prophets, the Angels and the Companions.
10. _Ridda_ (Apostasy).
11. _Zinā_ (Illicit sexual intercourse).
12. _Shurb_ (Drinking)
13. The method of carrying out _Ḥudūd_ punishments.
14. The manner of carrying out _Ḥudūd_ punishments.
15. The question of the establishing of charges concerning these offences.
16. Note on amputation.
17. _Taʿzīrāt_.

Prescriptions in the case of wounds
or destruction of complete members,
or part thereof

Wounds, if deliberate, according to the accepted Mālikī view, can only be compensated by qiṣāṣ. The authority for this is

> And we prescribed for them therein: The life for the life, and the eye for the eye, and the nose for the nose, and the ear for the ear and the tooth for the tooth and for wounds retaliation. But who so forgoeth it (in the way of charity) it shall be expiation for him. Who so judgeth not by that which Allah hath revealed.[1]

Matālif are excepted, and the diya is payable for these. It is also said that the wounded person may choose between qiṣāṣ and taking the diya, but this is contrary to the accepted view.

> It is not for a believer to kill a believer unless (it be) by mistake. He who hath killed a believer by mistake must set free a believing slave, and pay the blood-money to the family of the slain, unless they remit it as a charity. If he (the victim) be of a people hostile unto you, and he is a believer, then (the penance is) to set free believing slave. And if he cometh of a folk between whom and you there is a covenant, then the blood-money must be paid unto his folk and (also) a believing slave must be set free...[2]

Prescriptions in cases of killing

Killing is, by agreement, haram, except for some legal right. Quran, 6, 151.

Anyone who kills without a right, deliberately, simply as a wrongful act, shall be convicted for it, if he is of age and rational, and the person killed is his equal with regard both to Islām and to free status; the awliya' al-dam shall have a right over him, and may either kill or pardon him. After pardoning him, they may not then decide to accept the diya (rather than qisas); this is the generally accepted practice, based on Malik and Ibn al-Qasim. Ashhab, however, says that they may choose between:

(a) killing (i.e. qisas).

(b) pardoning plus the diya.

(c) pardoning without the diya.

They may settle for the amount of the diya (i.e. the recognised rate) or more or less.

If killing is established (i.e. if there is no doubt about both the fact of the crime and the means by which it was perpetrated), qisas must be taken by the same means as that by which the killing was done, without additions; one who has killed by means of alcohol or sodomy, however, may not be killed by these means in qisas. In the cases of killing by means of fire and poison, there is dispute as to whether the killer shall be killed by the same means. The apparent sense of the Mudawwana is that this is lawful (Malik is reported as saying, in the case

of poison, that qiṣāṣ should be taken as the Imām sees fit).

The categories of persons who may be killed in qiṣāṣ for those they have killed are as follows:

A free man for a free man;

A slave for a slave;

An unbeliever for an unbeliever;

A slave for a free man;

An unbeliever for a Muslim;

A male for a female;

A female for a male;

A male for a male;

A female for a female;

An old person for a young person (not vice versa)

(do kabīr and ṣaghīr here imply "of age" and "not of age", respectively?);

One whose members are complete (kāmil al-aʿḍāʾ) for one whose members are not complete (nāqiṣhā) (not vice versa);

One who is healthy of body for one who is infirm (not vice versa);

A noble person (sharīf) for a base person (danī);

A base person for a noble person;

A lofty person (rafīʿ) for a humble person (waḍīʿ);

A humble person for a lofty one;

(Is there a technical difference between sharīf and rafīʿ, and danī and waḍīʿ)

The following categories are not to be killed in these circumstances:

A free man for a slave;

A Muslim for an unbeliever;

unless (in both cases) the original killing is qatl ghīla, which is defined as killing by treachery in order to take the property of the person killed; in such a case the offence is treated as though the victim were a free man and a Muslim, respectively. Neither a Sultan nor a walī (al-dam) may pardon the killer in such a case, because he is like a muḥārib (does this imply that he incurs a ḥadd, rather than qiṣāṣ)

The following categories may again be killed:

A number of people for one person;

One person for a number of people;

A person who causes a killing, together with the person who actually executes it, and one who assists in it;

One who orders a killing, and one who is ordered to execute it, if they can both distinguish good and evil and are legally capable (mukallaf); the correct view here is that if the person ordered to execute a killing is not acting under fear or punishment by the person ordering it, he alone is to be killed, and not the latter as well.

If an unbeliever kills an unbeliever and then becomes a Muslim, he is not exempted from liability to qiṣāṣ by virtue of having become a Muslim. The same applies to a slave who kills someone and is then freed by his master; freedom does not exempt him from liability for the killing.

If the awliyā' al-dam wish, they may re-enslave him and cancel his freedom. Alternatively, if they prefer, his (former) master may redeem him from them by payment of the diya of the person killed, if free, or the value, if a slave.

A drunk person is to be killed in qiṣāṣ for one whom he has killed.

A madman is to be killed, like a sane person, if he kills during a lucid interval.

According to the generally accepted view, from which, however, Ashhab dissents, a father is to be killed in qiṣāṣ for killing his son, if there is no doubt that he did so deliberately. (Mālik however, says that if a father kills his son, in circumstances in which if anyone but the father would be killed for a similar act, the father is exempted from death as qiṣāṣ, but has harsh conditions imposed on him in paying the diya. Mudawwana, part 16, p.306).

If the walī al-dam kills the killer (without authorisation), he is liable to no penalty except adab for anticipating the Imām's judgement. If a stranger kills the killer, the walī al-dam may kill him in qiṣāṣ for the killer, as having usurped his right against him. If one of the awliyā' al-dam kills the killer, the others may demand from him their share of the diya.

Definition of awliyā' al-dam:

The awliyā' al-dam are the heirs of the deceased, the closer heir having a preferential right over the more distant, according to the order of inheritance. The Sultan is the walī of a person who otherwise has none. If the walī is not

of age, the Sultan shall appoint a proxy for him. If the deceased's heirs are women, they have the wilāya. If one of the awliyā' is absent, and those who are present have no-one to speak for him until he comes back, he need not be waited for, provided that there is no real prospect of his coming back. If one person kills a number of people, and one of their awliyā' kills him, the rest forfeit their rights.

Establishing of the killer's guilt in the killing:

This is established by means of:

1. His confession.
2. Just, conclusive evidence that cannot be refuted. If the accused has claims to have an argument against the evidence, judgement is to be postponed until he either produces it or fails to do so. If (the accuser ?) demands the imprisonment of his opponent until he can produce or complete his evidence against him, this is legitimate; he may not, however, demand a bail-guarantor for him, as there is no bail payable in matters of qiṣāṣ, according to the generally accepted view of the madhhab.
3. The statement of the dead man, to the effect that so-and-so is responsible for his deliberate killing, provided that he is free, a Muslim and legally competent.
4. One witness, for (straightforward) killing; two witnesses, for wounding and subsequent death, after the victim has eaten and drunk.

5. Testimony to having seen the dead man weltering in his blood, with the person suspected of the killing nearby, with the instrument of the killing in his hand, or with traces of the killing upon him.

6. Finding the deceased lying at the door of someone's house, or in a village, a tank or a lane.

This is the generally accepted view, but in cases 3-6 above, the guilt is not established except when evidence is accompanied by oaths, viz. that the awliyā' who are of age, rational, and entitled to the blood-right should swear fifty oaths confirming the allegation of the deceased or their own allegations concerning the above-mentioned indications. This applies if the awliyā' are two or more, the dead man is one only, and they are entitled to the blood-right. If there is only one walī al-dam, or there is more than one dead man, there can be no oath, and the allegations are void.

There can be no oath either in cases of wounding, or in cases between slaves or between dhimmis.

If the awliyā' wish to take the diya, but the killer refuses everything except qiṣāṣ, the awliyā's wish shall prevail; some, on the other hand, say that the killer's wish shall prevail.

A deliberate killer may not inherit property or diya. A deliberate killer who is pardoned shall be given 100 lashes by the Imām and imprisoned for a year. Similarly, if one accused of murder refuses to swear, he is to be detained

until he does so; if he persists in not swearing, he is to be given 100 lashes and remain in prison for a year.

Anyone who strikes a woman so that she produces a dead foetus, but herself remains alive, is liable to the ghirra (a diya of 1/20 of the full amount), if he is free and a Muslim, regardless of whether the striking was deliberate or accidental. If the foetus is produced (dead) after the woman's death, the generally accepted view is that there is no liability. If it is separated alive from the mother and dies immediately on birth, the diya is payable, if the striking was accidental, and, in the generally accepted view, if it was deliberate; some, however, say that in the latter case qiṣāṣ applies. If it dies after some time, the same holds good as in the previous circumstances, except that an oath is required. No distinction is made as to the state of development of the foetus, provided that the blow was on the (woman's ?) back, belly or side (some say on the head also), but not on the legs.

The same applies if someone frightens a woman, without striking her, and she produces a (dead) foetus, on five conditions:

1. The fact of the frightening is established by conclusive proof or by confession.
2. That the means by which he frightened her must be something that would normally frighten someone.
3. He should have frightened her in connection with something illegal (fī 'amr la yaḥill).
4. Witnesses should testify that she was confined to her bed from the time of the frightening until that of the miscarriage.

5. Women should have seen the miscarried foetus and testified to it.

There is no qiṣāṣ in a case of accidental killing; the diya is payable. If someone kills a person accidentally, his ʿāqila are liable for the diya, whether he is young (not of age .), old or mad.

Deliberate killing by a child or a madman is considered the equivalent of accidental killing. The same is true of a doctor's killing in the course of attempting to do good, and of a father's or a teacher's (killing a son or a pupil while administering legitimate chistisement).

When the diya for an accidental killing is incurred, the Imām shall impose it on the ʿāqila as payable by instalments over three years from the day of the judgement.

The ʿāqila shall not be responsible for the offence of the slave, or for the diya of a deliberate killing, the diya of reconciliation, the diya of one who has killed himself, the diya incurred by one who confesses to killing, or any compensation less than $\frac{1}{3}$ of the diya. If the person killed pardons the one who has killed him accidentally, only $\frac{1}{3}$ of the diya is payable.

Definition of ʿāqila:

The ʿāqila are the ʿaṣaba (relations on the father's side), being male and free, of the killer, who is included among them. It makes no difference whether they are closely or distantly related. Added to them are the qabāʾil, in order of closeness, and their qawm. Saḥnūn says that the limit of the number of ʿāqila is seven hundred, descended from one father. Ibn Rushd says, on Saḥnūn's authority,

that if the ʿāqila are reckoned at five hundred or a thousand, this is too few, and that the closest of the qabāʾil to them are to be added to them. Any of the ʿāqila who resides with a qawm is included with them as long as he has not moved to another community and detached himself from the one with which he was. Thus, he is not included even if he moves on the day of the imposition of the diya, although some say that he has to have moved before the imposition of the diya, even if it is only a few days before.

No-one shall have imposed on him a payment that will inflict damage on his property, so that people are to be assessed according to their means, by the ijtihād of the Imām. Nothing is to be taken from a poor man or an unbeliever. Nomads are not to be included with non-nomads, or vice versa, in the payment of a diya, even if they are of the same qabīla. (The point of this last provision is somewhat obscure, as it would seem to be covered by the principle of assessment according to means. Perhaps it has something to do with the communal nature of nomads' property, as opposed to the personal nature of that of non-nomads.)

The ʿāqila are not responsible for the diya in cases of wounding, if it does not amount to $\frac{1}{3}$ of the full diya. Nor are they responsible for the diya mughallaẓa, i.e. the diya payable by a father or a grandfather who accidentally kills his son or grandson respectively.

If a muslim kills an unbeliever, he is liable to pay the diya. If a free man kills a slave, he is liable to pay his value.

If two qabīlas separate, after a fight, leaving dead on either side:

1. if the killer is known, he is to be apprehended;
2. if the killer is not known:
   (a) (if there are dead on both sides), the diya for each side is to be levied on the property of the other side.
   (b) if the dead are of another party altogether, the diya is levied on both of the opposing bodies;
   (c) if the dead are of one of the two forces only, the diya is levied on the wealth of the other.

If two horsemen clash deliberately, and both die, there are no rights involved between them; if, however, one survives, he is liable to qiṣāṣ. The same applies when two foot-soldiers clash, or one foot-soldier and one horseman. If the clash is accidental, the diya of either is payable by the ʿāqila of the other, and the value of either horse is chargeable to the wealth of the other. If one of them is free and the other a slave, the diya of the free man is levied on the raqaba (person) of the slave (it is not clear what this implies) and the value of the slave is chargeable to the wealth of the free man.

Any injury or death caused by horsemen to one another in their sports on feast-days and such like are to be judged as deliberate rather than accidental.

If a person pursues another with a sword, etc. in order to strike him with it, and the other runs away, but stumbles and dies before his pursuer comes up with him, the pursuer is liable to qiṣāṣ.

A Muslim slave is not to be killed in qiṣāṣ for a free unbeliever.

If a person kills another after wounding him, he is liable only for the killing, if the two things are done on the same occasion. If a period of time separates them, he is liable first to qiṣāṣ for the wounding and is then to be killed.

If someone virtually effects the death of a person, and then another comes and finishes him off, only the first person is liable for the death; the second is liable to adab. This is according to Ibn al-Qāsim.

An accidental killer inherits property but not diya.

He details the matālif, as follows:

1. Jā'ifa : a wound that penetrates the interior or the belly or the back.
2. Hāshima : a wound that crushes the bone of the head.
3. Munaqqila : a wound that causes part of the bone of the head to be displaced, or broken, but does not reach the brain.
4. Ma'mūma : a wound that does reach the brain, even though only to the extent of the head of a needle.
5. Dāmigha : a wound that penetrates the outer membrane of the brain.

Also counted as matālif, although there is no qiṣāṣ for them, but only diya, are:

1. Contusion of the two testicles.
2. Breaking of the thigh.
3. Breaking of the spine.
4. Breaking of the neck.

In the case of accidental wounding (jirāḥ), there is no qiṣāṣ and no fixed diya, except for one particular kind of wound, namely, muwaḍḍiḥa: a wound by which the bone of the head is exposed. With all other wounds there are two possibilities: if the victim recovers but is left disabled, ḥukūma (ijtihād on the part of the Imām) is applied in awarding compensation; if the victim recovers without disability, no penalty attaches to the culprit except adab.

In the case of the loss of members (and, apparently, of faculties) such as: the cutting off of the hand, the foot,

the ear, the nose, the tongue, the penis, the testicles; the loss of the eye, the lips, the teeth; the cutting off of the fingers, the finger-tips (presumably the same applies also to the toes, as specified later); the loss of the mind, the senses of smell, hearing, sight, etc., the faculty of speech; diya or ḥukūma apply (as an alternative to qiṣāṣ, it is to be supposed, unless he is still talking about accidental injuries).

In the case of the loss of manāfiʿ (abilities), as a result of the loss of a member or part of a member, qiṣāṣ may be taken, if this is possible; if not, diya applies.

No qiṣāṣ or diya is to be taken for wounding, until the victim has recovered. No qiṣāṣ is to be taken for wounding, until the exact dimensions of the wound have been established.

He specifies the diya payable for death, and the various fractions thereof payable for wounding, as follows:

Death:	A free Muslim male:	100 camels, or 1000 dinars, or 12,000 dirhams.
	A free Muslim woman:	½ of above.
	A Jew or Christian (male):	½ of the diya of a male Muslim.
	A Jew or Christian (female):	½ of diya of male.
	A Majūsī (Zoroastrian) (male): (in Maghrib, possibly a Viking)	800 dirhams.
	A Majūsī (female) (or apostate female):	½ of above.

A slave:	his value (even if in excess of diya of a free man).
A foetus (free):	1/10 of the diya of the mother. If the father is free, but the mother is a slave, then 1/20 of the diya of the father.
A foetus (slave):	1/10 of the value of the mother.
A foetus (Majūsī or Dhimmī):	1/10 of the diya of the mother. (A free man pays 50 dinars, or 600 dirhams, or a slave (male or female) equal in value to 50 dinars. A Dhimmi infidel pays 25 dinars, or 300 dirhams. A Majūsī pays 40 dirhams. The diya of a foetus is not payable by the ʿāqila (those upon whom payment of the diya devolves after the person responsible for the death), but only by the person directly responsible (al-jānī)).

The *ghurra** (if it comes out dead) or *diya* (if it comes out alive) is increased accordingly if the woman has twins, triplets, etc.

Wounds:	*Muwaḍḍiḥa*	: 1/20 of the *diya*
	Hāshima:	: 1/10 & 1/20 (for female ?) or the *diya*.
	Munaqqila	: as for *Hāshima*.
	Maʾmuma	: 1/3 of the *diya*.
	Jāʾifa	: 1/3 of the *diya*.
	Hāshimat al-badan (i.e. other than of the head)	: *ijtihād* is applied.
	Maʾmūmat al-badan	: *ijtihād* is applied.
	Breaking of the thigh	: 1/3 of the *diya*.
	Loss of the mind	: full *diya*.
	Loss of one eye	: ½ of the *diya* (full *diya* for both).
	Loss of the sound eye of one-eyed man (whether its sight was good or not)	: full *diya*.
	Loss of the pupil of a blind eye	: *ijtihād* is applied.
	Loss of one ear	: ½ of the *diya* (full *diya* for both, even if hearing remains. But Mālik prescribes *ijtihād* for this).

Loss of the nose (whether of all or of one side taraf)	: full diya.
Loss of part of one side of the nose	: compensation is to be assess in proportion to the amount of the end (?) lost, not to the amount lost in proportio to the whole.
Loss of one lip	: ½ of the diya (full diya for both).
Loss of hearing (in one ear)	: ½ of the diya(full diya for loss in both).
Loss of ear of a deaf man	: ijtihād is applied.
Loss of sense of smell Loss of sense of taste Loss of power of articulation Loss of voice Loss of power of speech Loss of capacity for sexual intercourse Loss of ability to stand Loss of ability to sit	) all full diya
Cutting out of the tongue	: full diya.
Cutting out of part of the tongue (if speech is inhibited)	: full diya.
Cutting out of the tongue of a dumb man	: ijtihād is applied.
Loss of a tooth (whether molar (ḍirs) or other, and whether completely	

knocked out or broken off. The same applies if a tooth is merely blackened, reddened or loosened, especially if it belongs to one in whom a replacement will not grow (i.e. it is a second tooth))	: five camels.
Loss of a tooth of a young child, who will grow a replacement (i.e. a milk tooth)	: no compensation.
Loss of a (previously) loosened tooth	: ijtihād is applied.
Cutting off of a woman's breast (regardless of whether completely cut off, or only the extremity cut off, if no longer capable of producing milk)	: ½ of the diya (full diya for both).
Cutting off of the breast of a one-breasted woman	: full diya.
Prevention of the flow of milk only	: full diya.
Prevention of the flow of milk of a one-breasted woman	: full diya.
Cutting off of a man's breast	: ijtihād is applied.

Breaking of the bones of the chest	: full diya.
Breaking of the back	: full diya.
Loss of a hand/arm (yad) whether cut off from the elbow, the shoulder, the wrist or the fingers	: ½ of the diya.
Loss of a withered hand that is useless	: ijtihād is applied.
Loss of a finger	: 1/10 of the diya.
Loss of a finger-tip	: 1/30 of the diya.
Loss of the tip of a thumb	: 1/20 of the diya.
Loss of the penis, whether the whole or just the glans (from the place of circumcision	: full diya.
Loss of part of the glans	: compensation is to be assessed in proportion to the amount of the glans lost, not to the amount lost in proportion to the whole.
Loss of a penis that has no glans, or is useless, like the penis of a man who cannot have sexual intercourse because of its small size, or of an old decrepit man, or of one who cannot/will not (ḥaṣūr) cohabit with women	: ijtihād only is applied.

Loss of both testicles	: full *diya*.
Loss of left testicle	: full *diya*.
Loss of right testicle	: *ijtihād* is applied.
Loss of testicles and penis at same time	: 2 *diyas*.
Cutting of of woman's sexual parts (if the bone is exposed)	: full *diya*.
Destruction of the maiden-head with the finger (whether done by husband or stranger)	: *ijtihād* is applied.
Loss of buttocks (ʿ*ulyatān*) of a woman	: 1. Ibn al-Qāsim: *ijtihād* is applied. 2. Ashhab: full *diya*, ½ of the *diya* for one.
Loss of foot/leg (*rijl*) whether cut off from the hip, the knee, the ankle or the toes	: ½ of the *diya*.
Loss of a toe	: as for a finger, i.e. 1/10 of the *diya*.
Loss of the end of a toe	: as for a finger-tip, i.e. 1/30 of the *diya*.
Loss of the hair (or the head, eyebrows, beard or eyelashes)	: *ijtihād* is applied.

In the case of a blow with the hand (? *laṭma*), no *qiṣāṣ* can be taken.

In the case of the wounding (*jirāḥ*) of a woman, the liability, as far as the *diya* is concerned, is the same as that in the case of the wounding of a man. The same applies in the case of the wounding of an infidel.

In the case of the wounding of a slave, the liability, as far as the *diya* is concerned, is related to his value.

In the case of the cutting off of the extremities (*al-aṭrāf*), men and women are assessed equally, as far as the *diya* is concerned.

Ḥarāba/Muḥāraba

The ḥadd for this offence is specified in Qur'ān V, 33:

> The only reward of those who make war upon Allāh and His messenger and strive after corruption in the land will be that they will be killed or crucified, or have their hands and feet or alternate sides cut off, or will be expelled out of the land. Such will be their degradation in the world, and in the Hereafter theirs will be an awful doom.

If the Imām captures a muḥārib before he comes to him and expresses his repentance, he may not pardon him.

1. If the muḥārib has killed, he must be punished with death.
2. If he has not killed, the Imām has a choice of punishments that he may inflict:
   a) Death and crucifixion.*
   b) Death without crucifixion.
   c) Death while the muḥārib is being crucified.
   d) Amputation of opposite hand and foot.
   e) Banishment (if free and male) to another balad (town), in which he is to be imprisoned until he either repends or dies.

If the muḥārib comes to the Imām and expresses his repentance before being captured, he is not sentenced in this way:

1. The Imām shall require from him satisfaction of the rights of any human being, if any (that is to say, in respect of any offence against person

or property that he may have committed).

2. If none, the Imām shall not require from him satisfaction of the rights of God, and shall take no further action.

Restitution has to be made of all property that has been taken, and if a single member of a party of muḥāribūn is captured, he is held liable for all that has been taken by the whole party; he can then recover it from his associates.

Definition of a muḥārib**

1. One who terrorizes the highway, even if he takes no property and kills no-one.
2. One who sets out to commit highway robbery, but is taken before he can do this or anything else.
3. One who administers a soporific in order to take property.
4. One who draws a weapon in order to take property, even if he does not strike anyone.
5. One who goes alone (yanfarid waḥdahu) to commit robbery in a balad (town/village.).
6. One who, by deceit, induces anyone to go somewhere and robs him (there).
7. One who assists a muḥārib in any way.

Discretion in awarding punishment for this offence belongs to the Imām alone; no-one else may sentence a muḥārib.

Ḥarāba is established by:

1. evidence, even if the witnesses are those who have been robbed.

2. notoriety in *ḥarāba* (i.e. being known as a *muḥārib*), attested by two witnesses, even if they have not seen the accused involved in it themselves.

<u>Baghy</u>

Definition of a <u>bāghī</u>:

1. One who ceases to obey the Imām and opposes him, in order to overcome and defeat him.
2. One who continues to obey the Imām and does not (actively) oppose him but refuses to comply with any right (of God or of mankind), even if only by interpretation (this presumably means that one who does not accept the orthodox interpretation of the obligatory nature of some observance, as distinct from one who simply declines to comply with it, is a <u>bāghī</u>.)

The just Imām must combat such people as he would infidels, even if there are women and children among them, having first called on them to return to obedience and to comply with that right. He must not kill those of them who are in prison, except in a state of war. He may kill those in his custody if he is afraid that he will suffer a reverse at their hands and he thinks that he is not strong enough to deal with them. If, however, he is sure that they (that is, those who have been in arms against him) will not return (to fight him again) and that their power is broken, he must not finish off those of them that are wounded or kill those of them that are defeated.

(ʿAlī b. Abī Tālib's varying behaviour according to circumstances.

The crier of ʿAlī, in one of his wars with the bughāt, cried out: "Let not the fugitive be pursued; let not the wounded be finished off; and let not any prisoners of theirs be killed!" In another war, however, with other bughāt, he ordered the opposite to be done. When he was remonstrated with about this, he said: "These people have a main body and a refuge to retire to, whereas the earlier group had no main body with which to take refuge.")

If the Imām needs to commandeer their property, their weapons or their mounts to use against them, he may do so; he, or another Imām, should return these to them, after they have returned to his obedience. This is what ʿAlī did.

If the "people of interpretation"* appoint a Qāḍī and they take the zakāt from the people, Ibn al-Qāsim said that none of this was valid, and that the Imam might annul all of their prescriptions.

Qiṣāṣ may be taken on those who combat authority for lives that they destroy, and they are liable for the property that they destroy.

If the people of the Dhimma join them, they have broken the compact.

(This is not an offence for which a ḥadd is prescribed, nor does it appear to attract a taʿzīr. There are many passages in the Qurʾān enjoining obedience to those in authority, e.g. 4, 59:

but, apart from the implication that imprisonment was applied, no penalty is actually here specified. It is,

indeed, somewhat implausibly, to be inferred that, provided <u>bughāt</u> returned to obedience to the Imām, when called upon to do so, no action was to be taken against them.)

Sariqa (theft)

Definition:

Theft is the taking of property covertly, without muḥāraba. (The thieves of the Maghrib were called Muḥāribūn robbers (luṣūṣ) because they carried weapons.) Everyone who carries weapons for the taking of property is a muḥārib, whether the offence is committed by night or day.

> As for the thief, both male and female, cut off their hands. It is the reward of their own deeds, an exemplary punishment from Allah. Allah is Mighty, Wise.[1]

Penalties:

If a thief is of age and rational:

1. His right hand is to be amputated, if it is sound.
2. If his right hand is withered or is without fingers, or he has no right hand, his left hand is to be amputated.
3. If his right hand is amputated, and he repeats the offence, his left foot is to be amputated; if he offends a third time, his left hand is to be amputated; if he offends a fourth time, his right foot is to be amputated; if he offends yet again, he is to be flogged, banished and imprisoned (some authorities say that he is to be killed).
4. If a thief who has no right hand has his left hand amputated, for a second offence his left foot is to be amputated.
5. Cauterization is to be applied at any amputation.

6. If the person performing the amputation deliberately amputates the left hand (first), he is liable to qiṣāṣ, and the right hand is to be amputated as well. If the left hand is amputated (first) by mistake, the person performing the amputation is not liable to any penalty, and the ḥadd is satisfied with the left hand in place of the right.

7. If a thief steals less than ¼ dinar or 3 dirhams or the equivalent in value, on one occasion, he is not liable to amputation for that.

However, amputation is the penalty only for theft from a ḥirz, which is defined as:

A place prepared for the keeping of property. The important thing is that the owner should demonstrate that he is not careless or neglectful of his property, and that he has secured it, even if it is not locked up.

The following types of theft are specified as amounting to theft from a ḥirz:

1. The theft of any of the fittings of a mosque, i.e. anything that is actually fastened to the building, including carpets that are sewn together, although these are not fastened down. (A mosque is not considered a ḥirz for movable objects.)

2. The theft of a shroud from a grave.

3. Theft from the bayt al-māl, and the appropriating of any booty after it has been taken into official possession.

4. Theft from houses or shops or from their surrounding areas (: saḥātihā al-khārija), if goods for sale are placed there, and theft from the middle (court ?) of a house or of a caravanserai, if loads have been placed there.

5. Theft from the load of an animal, or from places where animals have halted for purposes of selling (: mawāqif al-bay^{c}).

6. The theft of animals (riding or pack? - al-dawābb) from where they have halted, whether they are tied up or not.

7. Theft from tents and their surrounding areas (saḥātihā).

8. Theft from a caravan, whether in motion or stationary.

9. Theft from a moored ship, whether there is anyone on board or not. Theft from a (non-)moored ship, if there is someone on board.

10. Theft from a maṭmūra (underground storehouse .) in any place.

11. Theft from a person's pocket or sleeve.

12. Theft from baths during hours of public access, if supervised; if unsupervised, during hours of closure as well.

13. The theft of sheep from a fold.

14. The theft of corn from a granary (al-zar^{c} min al-andar).

15. The theft of a slave that is not of an age to distinguish (right from wrong) (al-^{c}abd ghayr al-mujayyiz).

16. The theft of a free person; if he sells him, he (also) incurs the diya for that person.

17. The swallowing of a yāqūta (any precious stone) or a pearl or dirhams or dinars and thus taking them away.

18. The application to the head of oil or perfume equivalent in value to $\frac{1}{4}$ dinar or more, after making off with it.

There is no amputation for one who:

1. picks up (khaṭafa) something.
2. defrauds someone of something.
3. takes something by force.
4. steals, but has not yet taken the stolen thing from its place.

There is no amputation for a guest or a wife who steal, unless they steal from a place access to which is prohibited to them.

There is no amputation for one who steals the property of his son.

There is no amputation for one who steals from an Āmir, a Ṣādi, a Muftī or a doctor, during hours of open access to them.

There is no amputation for one who steals something that a small child is wearing.

If one thief bores his way into a hirz (presumably), and another brings out the stolen goods, both suffer amputation, if they are in league.

If they both bore their way in, and one of them brings out the stolen goods, the one who brings them out suffers amputation.

If one steals and another remains outside, the one inside handing out the stolen goods, he alone suffers amputation.

If one goes in, and one remaining outside puts his hand in through a hole or aperture (i.e. made or existing) or a door, is handed the goods by the one inside, and takes them out, he (the one outside) suffers amputation.

One who fastens a rope or something similar to goods, while himself being outside, and pulls them out to him suffers amputation.

If a thief is detained before leaving the place, but has thrown the stolen goods out, he suffers amputation.

In addition to amputation, the thief must return the goods, if they still exist; if they have been destroyed (or disposed of), he must pay compensation, provided that he is well-off up to the time of the amputation.

If a slave admits theft, he suffers amputation, but he is not liable to pay compensation, if the goods have been destroyed (disposed of). (The same applies to all offences to which he confesses carrying a corporal

penalty, short of the death penalty; in the case of offences that carry a monetary penalty, nothing can be imposed on him.)

Theft is established by:

testimony and confession.

If anyone, having confessed, pleads necessity, he does not suffer amputation, but has to pay compensation.

Note on amputation

There are differences between the fuqahā' regarding the method of amputation of the hand, Some say that it is to be performed at the wrist-joint (this is the most general view), while others say that only the fingers are to be amputated. The Khārijītes maintained that it had to be done from the shoulder interpreting the yad in the Qur'ānic verse as meaning the arm. Cauterisation is always to be applied after amputation, to prevent the death of the victim.

As far as the amputation of the foot is concerned, the general view is that it is to be performed at the ankle. ʿAlī b. abī Ṭālib, however, amputated only from the instep, in order to leave the victim half a foot on which to walk.

In general, the progression prescribed in the text, i.e. right hand, left foot, left hand, right foot, prevails. The Ḥanafī madhhab, however, stop at the second amputation; for a third offence, a thief suffers no further amputation, but is made to pay compensation for the stolen goods, being then flogged and imprisoned until he repents. The Ḥanafīs justify this proceeding on the grounds that this was ʿAlī's practice; a thief was brought before him for a third offence, having suffered amputation for the two previous offences. ʿAlī said that he would inflict no more amputation on him, because he would be unable, if he lost another hand, to eat or to clean himself, and if he lost another foot, to walk. He therefore flogged him and imprisoned him.

Apart from the one condition for the infliction of amputation on which the text concentrates, i.e. that the theft be from a _ḥirz_, there are three other conditions in the Sharīʿa, without which no amputation is to be inflicted:

1. The rather obvious one that the stolen property should actually belong to someone else.
2. That the property should be of a certain minimum value, the _niṣāb_, that is, ¼ dinar.
3. That the stolen property should not be _ḥarām_, such as wine or pig-meat.

Provisions concerning encroachment on others' rights, and liability

If anyone punishes his slave by cutting off a bodily member, he must free him in compensation.

If anyone bites a man's hand, and the other withdraws his hand so that the first man's teeth are pulled out, the general view is that he (that is the one bitten) must pay the diya. Some people say, however, that he has no liability.

If anyone looks into a house through a hole (window - kuwwa) or the aperture of a door (shaqq al-bāb), and someone (inside) strikes at him (deliberately) and puts out his eye, qiṣāṣ applies. If the striking is not deliberate, the diya is payable.

If someone props a pitcher or something similar against a man's door, and the man opens the door, not knowing that the pitcher is there, and it falls and breaks, or what is in it spills out, the owner of the house is liable for the pitcher and its contents.

(These last three apportionments of liability, particularly the first and the third, seem to be thoroughly inequitable, and it is difficult to see on what principle they are arrived at. The second is perhaps less unreasonable than the other two, particularly if the striking is deliberate; it is still not easy to see the justice in it, if the striking is not deliberate.)

If someone lights a fire on a roof on a windy day, and the fire damages something, he is liable.

If someone lights a fire on his own land, to burn straw or thorns or something similar, and it spreads to a neighbour's land, either by itself or because of the wind, and the first man has not taken precautions to prevent it spreading, he is liable for any loss of life or property.

The same applies if anyone releases water from his own land; he is liable for any loss of life or property. Any life for which the diya is payable by him, must also be paid for by his ʿāqila. If, however, the act was deliberate, qiṣāṣ applies.

If anyone complains to the Sultan about a man, knowing that when he brings him before the Sultan the Sultan will take money from him, provided he has a real grievance of which to complain and is justified in his plea, he is not liable for the money that the Sultan takes from the man; this is because the Sultan or his deputy are the only recourse that men have in their grievances, and this recourse is an inalienable right. In the same way, he is not liable for what the Sultan's officers may take from him (the other man).

If anyone attacks another person, intending to take his property or to kill him, his wife, his son, or anyone else under his protection, the person attacked may repel the attacker and combat him with any available means, even if he is forced to kill him, without liability - provided that he has warned him and tried to drive him away, if he is rational, and complained to the Sultan. If the attacker is a beast, a madman or a minor, the same applies,

provided that the person attacked has warned the owner of the beast, or the guardian (wali) of the madman or the minor, and has taken the matter to the Sultan, whether or not the owner of an attacking beast has it in a place in which it is lawful for him to have it.

If anyone sells a free person, the Sultan shall impose on him the task of searching for him, and if he cannot find him, he must pay the diya for him.

If a craftsman claims that certain articles belonging to other people that he was working on (presumably either repairing or, possibly, making, having taken payment in advance - yaṣnaʿ) have been stolen from his shop or his house, he must establish his claim that those very articles have been stolen from where they were. If he cannot establish this, but it is well-known that his shop has been robbed, he may swear that the articles were among the things that were stolen. If it is customary for craftsmen to leave people's belongings in their shops, well and good (i.e. they are not liable for them); if, however, it is customary to take them away from their shops, they are liable for them, on grounds of negligence.

(A case is quoted from al-Māzarī, concerning the capture and looting of al-Mahdiyya by the Byzantines in 480 A.H., in which the claims of the craftsmen and pawn-brokers that goods left, or pledged, with them had been stolen were eventually accepted, in accordance with his opinion, and against the opinions of all of the other numerous jurisprudents, when the Qāḍī discovered that al-Suyyūri held the same opinion as al-Māzarī.)

The plea of destruction by fire is to be treated like the previous one. If nothing is left of clothes that were in the craftsman's shop, he has to establish his claim as in the case of theft, otherwise he is liable. If something is left (so that the clothes can be identified), his claim will be accepted. (Clothes are, presumably, mentioned here simply as an example of goods liable to destruction by fire. It seems more probable, in this case, that the situation envisaged is that of their being made for clients who have paid for them in advance; this perhaps suggests that the same situation is envisaged in the previous paragraph. It is, however, possible, that the clothes have been left for repairs or alterations.)

If a young child, who can distinguish (between right and wrong) (mumayyiz), steals, destroys, breaks or spoils something, compensation must be paid from its own money, if any. The Mālikī madhhab provides that it be punished in the most appropriate manner (in addition), even if it has to pay compensation like one who is of age.

Some say that it is not liable to punishment. Others say that it is to be punished at the discretion (ijtihād) of the Imām. Others say that it should be punished as at school (i.e. beaten), and that it should not pay compensation for that part of the price of anything that it has sold already spent.

In the case of a child that cannot distinguish, there is dispute:

Some say that it should be treated like a child that can distinguish, and that compensation for property

should be levied on its property, while liability for blood (i.e. the diya) should fall on its ʿāqila. This is the preferable view. Some say that it has no liability, and that both property and blood have to be regarded as hadar (i.e. no claim can be made for them). Others say that property has to be regarded as hadar, but that the liability for blood should fall on its ʿāqila. (This, it seems, is analogous to the case with a madman. However, the text is defective here, so it is not certain in what precise respects this is so.)

There is dispute concerning the age at which a child becomes mumayyiz: Ibn al-Qāsim says, six months. Others say, eighteen months. Ibn al-Qāsim stipulates that a (non-mumayyiz) child should be one that cannot understand chiding (lā yanzajir idhā zujira: i.e. is not restrained from doing something by being told not to).

If a circumciser circumcises a child, and the child suffers sickness or death (as a result), the circumciser has no liability, provided he is expert at his craft. In the same way, if death or loss of property ensues on the performance by anybody of an action in a legitimate manner, he has no liability. This applies also to a judge, an executioner, and any similar functionary.

(This provision would seem at variance with the fourth one in this section, that concerning the pitcher leant against the door. Surely the householder's opening his door constitutes an action performed in a legitimate manner? Of course, what is under consideration here is a person's carrying out his trade or profession. Nevertheless,

as it stands, the statement would seem to be of more general application.)

Qadhf (Defamation)

Definition:

Qadhf is to allege that someone is a fornicator or a sodomite, or to say that he is not the son of his father or not the grandson of his grandfather. As generally accepted, it is counted as one of the rights of human beings.

It may be forgiven, before the case comes to the Sultan, but not afterwards, unless the Sultan knows that he (i.e. the plaintiff) wishes to conceal the matter; this applies, whether the right belongs to the person who brought the charge, to his father, to his grandfather, or to anyone concerned with knowledge of the affair (?).

Penalty:

The person who defames another, if free, rational, and of age, shall be awarded 80 lashes; if he is a slave but a Muslim, he shall be awarded 40 lashes. According to Mālik, if he is free but an unbeliever, he shall be awarded 80 lashes, like a Muslim; if he is a slave and an unbeliever, he shall be awarded 40 lashes. Other Mālikīs say that he is not to receive this ḥadd, whether he is free or a slave, but is to be punished at the discretion of the Sultan, according to the gravity of his offence, as a deterrent both to himself and others like him.

It is a condition that the person defamed should be free, Muslim, of age, chaste, muḥṣin, and known to be of good reputation.

If anyone calls a girl who is too young for sexual

intercourse a fornicatrix, he is liable to no penalty, and the same applies with a boy who is too young for sexual intercourse.

If anyone calls a person a son of a Jew or a son of a Christian, and that person has among his ancestors a Jew or a Christian, he is liable to no penalty. Anyone, however, who denies an Arab his lineage incurs the ḥadd, whereas in the case of an ʿAjamī or a Berber, he incurs no ḥadd; the Arabs are jealous of their lineage. The same (i.e. the ḥadd), if someone says to another, "You have no origin and no lineage."

If someone says to another, "Yā sāriq", "yā qarrān", "yā ma'būn", "Yā mukhannath", or "yā qaṭīm", and the person so addressed is not so, the ḥadd is incurred.

If someone calls another a fornicator, and the person is question has no penis, or is unable to have sexual intercourse, no ḥadd is incurred.

If anyone says to another: "yā ʿār ibn ʿār" or "yā kalb" or yā ḥimār", or "yā fāsiq", or "yā fājir", or "yā ibn fāsiqa" or "yā ibn fājira", he is liable only to adab, at the discretion of the Imām.

Provisions for those who fail to pray, fast, go on the pilgrimage, or who refuse to pay zakāt

Prayer:

One who fails to pray shall be required to do so within the time-limits of that prayer. If he then prays, he is free from penalty; if he refuses, he is to be allowed licence until the end of the prescribed time, which is, in the case of the ẓuhr and ʿasr prayers, until near sunset, and, in the case of the two ʿishāʾ prayers, until dawn, and, in the case of the ṣubḥ prayer, until sunrise. If he does not pray by that time, he is to be killed with the sword, as a ḥadd, as generally accepted. He is to be washed, shrouded and prayed over, and buried in a Muslim cemetery.

Ibn Ḥabīb says that he is to be killed for kufr, like one who disowns prayer, in that he says that there is no prayer or that it is not obligatory (farḍ), and that he shall not be washed, shrouded or prayed over, or buried in a Muslim cemetery.

If he says that he will pray and does not, he is to be killed, as generally accepted.

Ibn Ḥabīb, however, says that in this case he is not to be killed.

Fasting:

One who breaks his fast during the day in Ramaḍān, with either ḥalāl or ḥarām food, without excuse, is liable to severe punishment (ʿuqūba shadīda) on the ijtihād of the Imām, provided that he does not deny that he should fast, or say that Ramaḍān is not obligatory, or claim that there

is no fast, or disparage the s cred nature of the sharīʿa or express contempt for the sharīʿa. If he does this, he is to be killed for kufr.

Pilgrimage:

One who fails to make the pilgrimage is liable to no penalty, because people disagree as to whether it must be made as soon as possible or only at leisure, provided that he does not disbelieve that he ought to do so, and fails to make it on that account and refuses to do so; if this is the case, he is to be killed.

Zakāt:

One who does not pay zakāt on his money shall have it taken from him forcibly by the Imām, and this satisfies his liability. If a group of people combine to refuse payment of the zakāt, the Imām shall fight them for it and take it from them; he shall not, however, take captive any of their (women and ?) children. However, if they deny that it should be paid, he shall give judgement about them as though they were unbelievers.

One who is asked to pay the zakāt and says that he has already paid it is to be believed.

Penalties due, by agreement of the ʿulamāʾ, for reviling God, the prophets, the angels and the companions

A Muslim who reviles God is, by agreement of the ʿulamāʾ, an unbeliever; he shall not be asked to repent, and his repentance shall not be accepted. This is the view of Ibn al-Qāsim, on the authority of Mālik, and many of the ʿulamāʾ subscribe to it. His judgement is that of a Zindīq, except that he is to be dissociated from Islām and ascribed to another religion. At this point he may be asked to repent, and if he does so by returning to Islām, his repentance is to be accepted and he is to be forgiven; if he refuses, he is to be killed, like an apostate (murtadd). If he says that what he said was a mistake, and not deliberate, according to Shaykh Abū Muḥammad b. Abī Zayd's opinion on such cases, he is to be killed and his excuse and repentance are not to be accepted. (This paragraph seems to be somewhat confused, and it may well be that part of the text is missing; if we accept it as complete, the incoherence may perhaps be explained as follows: an offender is to be asked to repent only after having been treated as having apostasised. He is to be given one chance of revoking this apostasy. The final sentence is open to two interpretations: either it is a separate opinion, viz. that the offender is not to be pardoned in any circumstances, even if he pleads error; or it requires an unconditional acknowledgement of wrong-doing and declines to accept anything less. The former interpretation is the more probable.)

An unbeliever who reviles God, other than in terms of the unbelief that is part of his religion, such as contempt for the companions and shirk, in respect of which the unbelievers have made a compact with the Muslims, is to be killed; he is not to be asked to repent, and his repentance is not to be accepted. This is Mālik's view. Ibn al-Qāsim makes an exception for one who becomes a Muslim of his own volition. If, however, he reviles God in terms of his unbelief, by alleging, for example, that He did not send Muḥammad to us, or that he sent him only to the Arabs, he is not to be killed; some say that he should be killed, on the grounds that he has broken the compact, by which the Muslims agreed to tolerate unbelievers only on condition that they did not display to believers any of their unbelief.

A Muslim who reviles the Apostle of God, or finds fault with him, speaks ill of him or harms him, is to be killed, as a ḥadd; he is not to be asked to repent, and his repentance is not to be accepted. His heirs, however, may inherit his property. This is the generally accepted view of the Mālikī madhhab, of Mālik's companions, of the salaf and of the communities of ʿulamāʾ. Some say that the Imām is to choose whether he shall be killed or crucified (i.e. displayed in public in a shameful manner, but not necessarily killed) and suffer some appropriate punishment that is greater than that.

An unbeliever who reviles the Apostle of God, other than in terms of his unbelief, such as alleging that he was a liar, is, according to Mālik, to be asked to repent; if he does so and becomes a Muslim, he is to be left alive,

but punished as a warning. If he refuses to do so, he is to be killed. Mālik is also reported to have said that he is to be killed without having been asked to repent. One who reviles him in terms of his unbelief, by saying, for example, that he was sent only to the Arabs, shall suffer no penalty for his unbelief, but shall suffer adab for stating it; some say that he is to be killed.

The judgement on one who reviles the other prophets is the same as that on him who reviles the Prophet of God. The same applies to him who reviles the angels. In the case of one who reviles the companions of the Prophet, the generally accepted view of the Mālikī madhhab is that the Imām shall exercise his ijtihād in punishing him; he should award him a severe nakāl (exemplary punishment) and a painful adab. If, however, the reviler attributes error to them, he is to be killed. The same applies to one who reviles the Prophet's wives or family.

Ridda (Apostasy)

Definition:

Ridda is unbelief (kufr) after accepting Islām and recourse to God. One who disbelieves after having accepted Islām, without the excuse of having done so against his will, is a murtadd (apostate).

Treatment of a murtadd:

A murtadd shall be for three days asked to repent. If he does so, all is well; if he does not, he is to be killed. The latter shall not be washed, shrouded or prayed over; his private parts shall be covered, and he shall be deposited in the earth, but not in a Muslim cemetery.

His heirs shall not inherit from him; what he leaves shall become the property of the bayt al-māl.

The penalty is the same, whether the kufr is explicitly stated or implicit, such as rejection of prayer and fasting and the other legal requirements to fulfil what are recognised as the essentials of the faith of Islām, or belief in the influence of the stars. (This last example is something that appears to have been generally disregarded, to judge by the wealth of astrological literature and references that are found.) Kufr can also be manifested by deeds, such as throwing a Qur'ān into the filth, wearing a zunnār (the distinctive sign of a non-Muslim) while in an Islāmic country, and prostration before an idol.

If a murtadd has a small son, he is a Muslim and is not to be associated with his father. If he apostasises

with his father, he is to be left alone until he comes of age; if he then repents, all is well, and if not, he is to be killed.

Ibn al-Qāsim says that he is not to be killed on coming of age, regardless of whether he was born before or after the ridda (of his father).

One who changes from one religion of unbelief to another shall not, in the accepted view, be obstructed but should be left alone, since kufr constitutes one single religious body (milla).

Some, however, consider that he should be killed, because the ḥadīth: "Kill anyone who changes his faith!" is of general application.

Zindīq:

A zindīq is defined as one who professes belief (in Islām) and disbelieves in secret.

He is to be killed, and his repentance is not to be accepted, unless he is not known to be a zindīq before he offers his repentance.

Magician/sorcerer:

If he is a Muslim, he is to be treated like a zindīq.

If he is a dhimmī,

(i) he is liable only to adab, if he has bewitched only unbelievers;

(ii) he is to be killed, if he has bewitched Muslims as well, because he has broken the compact (between the Muslims and the dhimmīs). His repentance is not to be accepted, unless he accepts Islām.

Ibn Rushd says that he is to be killed, even if he does accept Islām.

Zinā (Illicit sexual intercourse)

Punishment:

One who is free, of age, rational and muḥṣin, who deliberately commits zinā, shall be stoned until he dies.

If he is not muḥṣin, he shall be lashed one hundred lashes.

Qur'ān, 24, 2.

Definition of iḥṣān:

Iḥṣān is the state of having been lawfully married and having had lawful sexual intercourse. It is irrelevant whether or not those who commit zinā are (actually) married at the time of the zinā - for example, they may have been divorced and not remarried, or be widowed (this applies equally to men and women); the only stipulation is that marriage shall have preceded the zinā.

If a slave commits zinā, he shall be lashed fifty lashes.

Male and female are treated the same as regards the penalties both of stoning and lashing.

Sodomy (ʿamal qawm Lūṭ):

One who commits sodomy, whether as the active or the passive partner, whether muḥṣin or not, whether slave or free, provided he is of age, shall be stoned until he dies. If one partner is not of age, he shall receive appropriate adab.

Establishment of zinā:

Zinā is established by:

(i) voluntary confession by a rational person who is of age;

(ii) pregnancy in an unmarried woman;

(iii) the testimony of four men who are free, of age, and just, who have seen it committed "like a collyrium needle in a collyrium pot".

Otherwise, or if the testimony of the four witnesses does not agree, the accused is not liable to any penalty. Witnesses who cannot produce testimony that meets the conditions stated are to be punished with a <u>ḥadd</u> (presumably for <u>qadhf</u>).

Lesbian activity:

Two women found together are liable to <u>adab</u>, on the <u>ijtihād</u> of the Imām; they are not to be severely punished, such as by the amputation of a member, or anything of that kind.

Aṣbagh states that each should be lashed fifty lashes, but the <u>ijtihād</u> of the Imām is the correct decision.

Drinking

Penalty:

If a Muslim who is free, of age and rational, drinks khamr or nabīdh, of whatever kind, whether it be a large or a small amount, whether or not he becomes intoxicated, he is liable to a ḥadd of eighty lashes, but not banishment. Male and female are to be treated the same in this

"Whatever intoxicates in large quantities is ḥarām in small quantities." This means that the drinking of a small quantity involves exactly the same ḥadd as the drinking of a large quantity.

There is no ḥadd prescribed for one who is made to drink against his will, or for one who is obliged to drink, e.g. one who chokes on a mouthful of food, can find no water and fears that he will die; there is no ḥadd prescribed either for one who drinks on account of severe hunger or thirst, on account of which he hears death, according to Ibn al-ʿArabī, or for one who drinks an alcoholic drink thinking that it is non-intoxicating.

A drunken person is not to be lashed until he has recovered from his drunkenness. When he is lashed, it is the generally accepted view that he should be paraded round the markets and then imprisoned.

The method of carrying out ḥudūd punishments

Qiṣāṣ:

Our (i.e. Mālikī) ʿulamāʾ say that the Sultan may permit the person against whom the offence was committed to exercise qiṣāṣ only when life is involved; he may hand over the killer to him to take his qiṣāṣ.

Ashhab says that he may not do so in any case. (It is not clear just what is meant here. It seems to state that the Mālikī ʿulamāʾ, as a whole, do not recognise the legitimacy of qiṣāṣ, except in the case of killing, and that Ashhab does not recognise it even in that case. On the other hand, it may mean that the taking of qiṣāṣ should not be entrusted to the person whose right it is, but should be exercised by the authorities on his behalf. The person against whom the offence was committed (al-majnī ʿalayhi) is, in the case of killing, the walī al-dam.)

Qiṣāṣ may be taken only at the command of the Sultan. If the walī al-dam or anyone similar takes the law into his own hands and takes qiṣāṣ without his command, he is to be punished for that, in order to prevent murder under the pretext of qiṣāṣ (? al-dharīʿa) and to stop people infringing the rights of others.

Ḥudūd other than qiṣāṣ:

No-one is to carry these out other than the Sultan, or someone appointed by him - an Amīr or Qāḍī or someone similar - not even a husband in the case of his wife, or a master in the case of his slave, except for drinking,

zinā and qadhf, in which a master is permitted to carry them out on his male or female slave, without reference to any Sultan; the ḥudūd (text has qiṣāṣ) for theft, killing and the rest are to be carried out only by the Sultan. In the case of a free man, only the Sultan can carry out the ḥadd or any other kind of punishment (sā'ir al-ʿuqūbāt wa-al-zawājir), regardless of whether the right involved in the offence is that of God or that of a human being.

If a slave commits an offence, in which the right of God or the right of a human being is involved, and he is married to a free woman or to a female slave belonging to another master, only the Sultan may carry out the ḥadd upon him. The same applies to a female slave married to a free man or to a male slave belonging to another master.

Ḥudūd involving lashing:

These are not legitimately carried out with a rod (qaḍīb) or a scourge (dirra) or anything of the sort; they are legitimately carried out only with a whip (sawṭ) of medium size, with no knots at the end (ra's). The lashing is to be moderately painful; it is not legitimate to inflict no pain. An old man, a young man and a woman are treated equally in this.

Qur'ān, 24, 2:

The person lashed shall be seated, with back and shoulders uncovered, and with private parts covered. If the lashing is administered to any other part of the body but the back, it is unacceptable and is to be repeated on the back, without the judge's incurring any liability.

The person lashed is not to be bound or fettered, unless he creates such a disturbance as to prevent the lashing being inflicted on the proper part of the body, or it is feared that he will run away.

A woman is not to be uncovered; she is to retain such clothes as do not pad her body or protect it from the pain of the lashing. Mālik recommended that she should sit in a basket, as being better for keeping her covered.

The Sultan may not remit any *ḥadd* or accept intercession for anyone who has incurred one. He is obliged to carry it out on anyone liable to it, regardless of that person's status.

No *qiṣāṣ* or *ḥadd* is to be carried out on a pregnant woman, until she has given birth, or on a nursing mother, until the infant has been weaned. Nor is it to be carried out on a sick person, until he recovers, or on a person of disordered mind, until he comes to his senses. Nor is it to be carried out in conditions of severe heat or cold, except for the *ḥadd* of killing, where it makes no difference.

The Sultan shall appoint for the carrying out of *qiṣāṣ* only just, knowledgeable pious people, especially in cases of wounding, in which they must be skilful. They are to receive payment for this, paid, according to the generally accepted practice, by the person offended against; some, however, hold that it is to be paid by the offender, and others again choose whether it is to be paid by the one or the other (according to circumstances).

The question of the establishing of charges concerning these offences

These offences are established beyond any doubt against the accused, if the charge is supported by a just, convincing proof, or even an unjust proof, provided that the accused is left absolutely no argument against it or rebuttal of it, when it is produced.

The accused's own confession is an even stronger means of establishing the offence than the convincing proof (ḥadīth of the Prophet: "A man's confession against himself is the best means of convicting him") provided he is rational, of age, and his confession is voluntary and not forced. If his confession is forced, by any means, nothing of what he has confessed is taken as incriminating, unless he persists in it and does not retract it. He is left in prison until the Sultan can investigate his case. If, when secure from any form of compulsion, he persists in his confession and produces evidence of his truthfulness, such as specifying the goods stolen or the person killed, or something of the sort, his confession is to be treated as incriminating and he is to be convicted on the strength of it. If there is any compulsion, he is not to be regarded as incriminated by anything that he may confess, even though he may have specified the goods stolen or the person killed, unless there is independent evidence corroborating his confession. This is the view of Ibn al-Qāsim.

Mālik says that if he specifies the goods stolen he is to suffer amputation, and that if he specifies the

person killed he is to be killed, unless he claims to have done so from fear or influenced by pain.

Saḥnūn says that a person imprisoned by the Sultan, who confesses in prison, should be convicted on the strength of his confession (only) if he is a truthful and just person; those who are imprisoned are not all of the same standard in truth and falsehood. However, he is also reported to have said that one who confesses should be considered to be incriminated by his confession, whether it is just or not (i.e. whether given voluntarily or under compulsion) because evil people are brought to the truth only by <u>taʿzīr</u> and intimidation, and that only those who are experienced in judgement recognise this.

In the case of someone against whom one of these charges has been brought, where there is no convincing proof against him and he does not confess:

1. if the charge is of killing and comes from the person killed, it is to be regarded as established against him, even if he is as upright as ʿUmar b. ʿAbd al- Azīz;
2. if the charge is of something else, such as theft:
   a) if the accused is well-known for probity, and two people cannot be found to impugn his justness, piety and trustworthiness, the charge is not to be entertained, and the person who brought is to receive <u>adab</u>;
   b) if the accused is a suspicious character, he is to be detained on the strength of the charge alone and imprisoned for a period and with a rigorousness commensurate with the degree of suspicion with which he is regarded.

Mālik says that a person may be imprisoned for years, on suspicion of killing, if what requires an oath cannot be established against him.

The ahl al-madhhab (Mālikī ʿulamāʾ) say that one who takes people's property and trades with it, then claims to have lost it, is to be imprisoned until he restores it, or else dies, if he cannot produce evidence of his veracity, such as the fact that his house burnt down or the property was stolen. Saḥnūn adds that he is to be flogged repeatedly with the scourge (dirra) until he restroes it, even if this treatment drives him to suicide.

Taʿzīrāt

In offences for which the law (shar') does not prescribe a ḥadd punishment, the punishment is left solely to the discretion of the Imām, who may take into consideration the nature of the offence, who the offending and offended parties are, and so on. There is no difference here between offences involving a right of God, such as eating during the day in Ramaḍān, and those involving a human right, such as abuse or blows; there is, however, no human right that is divorced from the right of God, in that one of the rights of God over his worshippers is that they should not harm others.

For this reason, the Imām may not excuse one who happens to commit an offence through ignorance, but must judge an offender in accordance with what he thinks fit. This acts as a deterrent to evil-doers from engaging in similar offences. This is a function, in particular, of Imāms who are Caliphs (i.e. Imāms who are rulers) or of those whom they appoint for this purpose; their judgement of what is expedient is stronger than that of (ordinary) Qāḍis.

It is legitimate for the Sultan to listen to qadhf from his assistants, Amirs and governors concerning suspicious characters, without verifying their allegations, and to have recourse to what they may say concerning the circumstances of the people, in order that he may be fully informed about those who are suspect and those who are virtuous and requite them appropriately by virtue of his knowledge.

The Sulṭān may apprehend/convict (akhadha) a suspected person on the strength merely of appearances, such as the way in which he is adorned or dressed; he may flog a suspect on the first occasion (on which he is apprehended) and imprison evil-doers until they die - and many other things that do not come within the lawful competence of a Qāḍī. The competence of the Sultan is wider than that of other lesser rulers - wālīs and ḥākims. He must deter (zajr) and punish (taʿzīr) anyone who commits an act of disobedience (maʿṣiya) for which there is no ḥadd, in respect of the rights of God or of man, at his discretion: he should punish lightly the virtuous man who has been guilty of one injudicious lapse, and he should punish severely (persistent) evil-doers. If he wishes to pardon, he may do so, except in cases involving the right of God. He may punish acts of disrespect towards himself that have no specified punishment in a pumber of different ways, from imprisonment or flogging to expulsion from his majlis, according to the circumstances, the gravity of the offence, and the status of the person concerned. If a low and vicious person behaves badly to a person of standing, he should receive a severer punishment than a person of standing who behaves in the same way to an inferior, according to what Ibn Rushd implies. A person of standing should not be imprisoned except for an offence that merits it.

The Imām may award taʿzīr that exceeds what is awarded as ḥudūd punishments. Muṭarrif and Ibn al-Mājishūn say that he may lash an offender even if this leads to his death. In the ʿUtbiyya, Mālik is reported to have awarded 400 lashes

for an offence, the recipient of which died. Aṣbagh is said to have fixed the maximum number of lashes for a non-ḥadd punishment at 200; in the Wāḍiḥa the number is given as 300; according to Ibn Maslama it is 80; and according to al-Qaʿnabī it is 75. Some ʿulamāʾ give the following prescriptions:

1. Anyone who abuses a person in the Sultan's majlis, to an extent that does not incur the ḥadd, shall receive 10 lashes.

2. Anyone who draws a sword on a person, with hostile intent, shall receive 40 lashes, and his sword shall be confiscated to the treasury. (Some say that anyone who draws a sword on a person, with the intent of muḥāraba (here used in the technical sense), is to be killed by the Imām.)

3. Anyone who draws a sword among a group of people, threatening by way of a joke, shall receive 20 lashes; if he draws a knife as a joke, he shall receive a few lashes (text: aswāṭan; with this reading it is clear that no numeral can have fallen out).

4. Anyone who disobeys the order of an Amīr or disregards his summons (kasara daʿwatahu) shall be punished at the discretion of the Imām. (Some say that anyone who disregards the summons (kasara daʿwa) of a Qāḍī or a Ḥākim shall receive 40 lashes.

5. Anyone who calls a man 'ẓālim', when he is not, shall receive 40 lashes.

6. Anyone who calls a man a criminal (mujrim) shall receive 25 lashes.

7. Anyone who calls a man a thief (sāriq) shall receive between 15 and 20 lashes.

8. Anyone who attempts to slander the Sultan shall receive 100 lashes.

9. Anyone who says unfitting things about a ʿālim or a walī shall receive 40 lashes.

10. If two adversaries raise their voices against one another in court (majlis al-ḥukm), both shall receive 10 lashes.

11. Anyone who says something untrue about a person shall be asked for proof; if he cannot produce it, he shall receive adab.

12. Anyone who disobeys the judgement of a Qāḍī, being dissatisfied with it, shall be punished (ʿūqiba), unless he can show that the judgement is unjust, in which case he is liable to no penalty.

13. Anyone who steals less than ¼ dinar, or anything for which amputation is not prescribed, or from a place that is not a ḥirz, shall receive 50 lashes. (Some say that if he steals something for which amputation is not prescribed from a ḥirz, he shall receive 60 lashes. Some jurists also say that if a thief is taken in a house, with the stolen goods collected in front of him, he shall receive 40 lashes; if he has pierced through (a wall) but has not entered, he shall receive 20 lashes; if he has entered but not stolen, he shall receive 30 lashes; if he is found opening the doors but is taken before he has opened them, he shall receive 10 lashes.)

14. Anyone who exchanges glances/winks (taghāmaza) or jokes with a strange woman shall receive 20 lashes, as shall the woman also. The same applies to anyone who does the same thing with a boy; he shall receive 20 lashes, and the boy shall be reproved.

15. Anyone who (deliberately) touches (jassa) a woman shall receive 20 lashes; if she allows him to do so, she shall receive the same number.

16. Anyone who is found in an empty house with a woman, both of them being clothed, shall receive 30 lashes, as shall the woman; if they are both unclothed, but not engaged in intercourse, they shall both receive 40 lashes; if they are engaged in intercourse, they shall both receive 50 lashes; (it is difficult to see how this offence, which incurs taʿzīr, differs from zinā, which incurs a ḥadd. It may be that the strict conditions concerning the number of witnesses required to prove zinā are relaxed here, but this is not stated.)

17. Anyone who follows a woman in the street to solicit her shall receive 30 lashes.

18. Anyone who speaks obscenely about an Amir shall suffer a severe punishment (ʿuqūba) and shall be imprisoned for a month in addition.

Anyone who calls another a usurer, a fājir or a fāsiq (both = transgressor, libertine, profligate), or an ass, or any similar abusive or derogatory name, is liable to taʿzīr.

In *ta'zīr*, the Imām may punish with banishment for any period that he pleases, up to two years. He may also flog with the *sawṭ* (whip), the *qaḍīb* (rod) and the *'aṣā* (stock), and with a bigger *sawṭ* than that prescribed for the *ḥadd*.

If, in a matter of *ta'zīr*, the person whose right is offended against pardons the offender, after the case has been brought before the Sultan, this pardon may be carried into effect only with the Sultan's consent and consideration. He may either release him without punishment or punish him anyhow, for he is to consider the most beneficial course. If he wishes to deter him and others and to regulate the conduct of the people, he will punish him; otherwise he will pardon him.

The Imām may entertain intercession in cases where *ta'zīr* is incurred, except in matters where the right of God is involved (Rabāṭ omits "except"; it is possible that a contrast with the *ḥudūd* in general is intended, but it seems more likely that the right of God is not to be abrogated).

The Imām shall not punish a teacher if he beats his boys, unless he exceeds the limit of chastisement, which is from three to ten strokes, or fifteen, according to one authority. Some say that there is no definite limit, provided that he does not exceed the usual number of strokes that he inflicts. The same applies to a father's chastising his son or a master's chastising his slave: neither must exceed the usual number of strokes that he inflicts. The same again applies to a husband's chastising

his wife, if he beats her to stop her infringing his right; Ibn Rushd says that he may beat her for failing to pray.

If the Sultan lashes someone by way of ta'zīr, he may do so on any part of the body except the face and the maqātil and may uncover him except for the private parts.

The judges (ḥukkām) bear no liability if someone dies from a ta'zīr lashing, provided that they did not intend this to happen from the first (it is permissible, however, for the Imām to kill someone (in this way) for the public good). This is in accordance with the already enunciated principle that there is no liability on anyone who performs an act that is permissible, in the correct manner, from which loss of property or death results. This is the view of the community of 'ulamā'.

If the Sultan knows that the ta'zīr will do no good, and that the offender will not be deterred by it, he should abandon it and imprison the offender, if he is of age, or let him go, if he is under age.

Extra Note

1 * Ghurra is the term used for the diya of a foetus. It is assessed at 1/20 of the full diya.

2 * Crucifixion here is not intended as a method of execution, but rather as a means of exhibiting the offender - a form of pillorying or gibbeting, depending on whether he is alive or dead at the time.

3 * Rather unusually, and illogically, the definition of the offence comes after the discussion of its punishment.

4 * Ahl al-ta'wīl: these are, presumably, those who are alluded to in 2, above.

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foot note p 10

1 Qur'ān, V, 45

2 Qur'ān, IV, 92

Chapter 2

Bashā'ir al-futūḥāt wa-al-suʿūd and

Yaḥyā b. Abī al-Barakāt

The Manuscripts of Bashā'ir al-futūḥāt wa-al-suʿūd fī Aḥkām al-Taʿzīrāt wa-al-Ḥudūd.

1. Description of the copies used.
2. The Author: Yaḥyā b. Abī al-Barakāt.

Bashā'ir al-futūḥāt wa-al-suʿūd and Yaḥyā b. Abī al-Barakāt

Bashā'ir al-futūḥāt wa-al-suʿūd was written by Yaḥyā b. Abī al-Barakāt at the request of King ʿAbd Allāh b. al-Mutawkkil ʿalā Allāh al-Manṣūr bi-Faḍl-Allah Abū ʿAbd Allah[1] in the latter part of the ninth century A.D. This king was the last of the Banū Ziyān, and was known as Al-Sulṭān Abū Thābit. His full name was Abū ʿAbd Allah Muḥammad al-Mutawakkil ʿalā Allāh b. Abi Ziyān Muḥammad al-Mustaʿīn bi-Allāh b. Yūsuf and he became king in 866/1462.

Of the author of the work and the king who commissioned it we know very little apart from sparse mentions in a very few sources.[2]

From the fragments of records left to us we are hardly able to form any impression of Yaḥyā b. Abī al-Barakāt, but we can try to piece together the available information in order to arrive at some idea of him.

His full name is Yaḥyā b. ʿAbd Allah b. Abī al-Barakāt al-Ghammārī al-Nālī.[3]

Another reference gives his name as Abū al-Barakāt b. Abī Yaḥyā al-Nālī.[4]

In yet another manuscript his name appears as Abū Al-Barakāt b. Abī Yaḥyā b. Abī al-Barakāt al-Tlimsānī.[5]

A mention is also made of one Shaykh Abū al-Barakāt al-Ghammārī,[6] and of Yaḥyā b. ʿAbd Allah b. Abī al-Barakāt, his kunyā being Abū Zakariyā.[7]

There is no certain proof of Yaḥyā b. Abī al-Barakāt's being born in Tlemcen. All we really know for certain is

that he worked there as a Judge and was mentioned by one of his colleagues as "Our friend, Yaḥyā b. Abī al-Barakāt Qāḍī al-Jamāʿa."[8]

There is no detailed information about the author's early studies and training. Indeed our only relevant information comes from knowledge of the traditional methods of study in al-Andalus and al-Maghrib, and the very high standing there of ʿUlamāʾ at that time. We know the names of some of his colleagues, and the names of some of his teachers. We also know that the Qāḍī of Tawat in al-Andalus sent for the ʿUlamāʾ of Fes, Tunis and Tlemcen to help to fight the local Jews. As a member of the ʿUlamāʾ of Tlemcen, Ibn Abī al-Barakāt is said to have prepared himself hastily to do so, but we are not told if he actually set out.[9]

One reference mentions that Ibn Abī al-Barakāt had a son, whose name was Muḥammad b. Abī al-Barakāt al-Nālī al-Tlimsānī.[10]

According to two sources[11], Yaḥyā b. Abī al-Barakāt's teachers were:

1. Qāsim al-ʿUqbānī: Sidī Qāsim b. Saʿīd b. Muḥammad al-ʿUqbānī. He was a Muftī for the whole city of Tlemcen. He was also the teacher of al-Wansharīsī[12], and many others. He died in 854.A.H.
2. Al-Ḥafīd b. Marzūq: Muḥammad b. Aḥmad b. Muḥammad b. Aḥmad b. Muḥammad b. Muḥammad b. Abī Bakr b. Marzūq al-Ḥafīd al- ʿAjīsī. He was al-Tlimsānī, the chief of the ʿUlamāʾ. He died in 842.[13]
3. Sulaymān al-Būzīdī: al-Sharīf al-Tlimsānī Abū al-Rabīʿ, who was a very famous teacher of the Mālikī Madhhab. He died in 854.[14]

If the date of the composition of the work, 888 A.H., mentioned in (ل) is accepted, Ibn Abī al-Barakāt probably wrote it at a fairly advanced age, seeing that he was Qāḍī al-jamāʿa at the time, a post unlikely to be held by any but a man of considerable legal and judicial experience. This is supported, too, by the fact that al-Wansharīsī, who was more or less his contemporary, is known to have died in 914 A.H., aged at least 80.[15]

The Manuscripts

In the edition of this work, three copies of the text of Bashā'ir al-futūḥāt wa-al-suʿūd fī aḥkām al-ta zirat wa-al-ḥudūd have been used, all from Morocco.

1. The first manuscript is from the King al-Ḥasan II Library in Rabat. This is the master manuscript. (ر)
2. The second one is from the Library of al-Jāmiʿ al-Kabīr in Meknes (م).
3. The third one is again from Rabat, from the Library of al-Khazāna al ʿĀmma (ع).

The Master Manuscript (ر) (Rabat - King al-Hasan II Library)

This is listed as no. 103. It consists of 214 pages, measuring 25 x 15 cm. There are approximately 5 lines to every page, and each line consists of between 25 and 27 words. The pages are numbered with European numbers and are of uniform size. The paper is of very good quality, of medium thickness, smooth and shining, and of a light cream colour.

All the titles and most of the initial words of individual paragraphs are in red or gold ink, but the actual text is written in dark brown ink. The script is Andalusi. Whereas some writing of this type is somewhat difficult to read, this example is not only easy to comprehend but is of a bold and vital character.

It is an old manuscript, but only the title page is beginning to show signs of age.

The Basmala is written in large letters in brown ink, with some decoration in red within a square green area, with

the title, <u>Bashā'ir al-futūḥāt wa-al-suʿūd</u> in white.

Whereas it is mentioned in the manuscript that the author composed the work in 888, there is no date given for the completion of the manuscript itself. The scribe is not named.

The four pages before the list of chapters contain a certain amount of writing in various hands of differing degrees of legibility; this material is, as far as can be seen, in no way relevant to the contents of the work itself, and consists of quasi-devotional matter in prose and verse. The manuscript contains some more or less illegible marginalia on pp.102, 131, 134, 136, 144 and 191, none of which appears to be relevant. The final page, and the slip attached, contain some notes, again virtually illegible, although a date (1102?) can be made out.

Lastly, it is one of the most precious manuscripts in the King's Library

<u>The Meknes Manuscript (خ) (Al-Jāmiʿ al-Kabīr)</u>

The manuscript is listed as no. 276. Covered in brown leather, it is rather large, its overall size being $28\frac{1}{2}$ x $19\frac{1}{2}$ cm with a written area covering 21 x $14\frac{1}{2}$ cm. The paper itself is rough, and rather thick, and although originally presumably white, has through age become faded, and the last third of the manuscript has become somewhat worn.

The manuscript consists of 105 pages; every page has 12 lines, and in every line there are approximately 6 - 8 words.

It is written in more than one hand and with more than one colour of ink, in legible Maghribi script.

The manuscript starts with an index, followed by the pages of the text numbered from 1 to 104.

It is marked "Meknes Library". The name of the author is given as Abū Zakarīya Yaḥyā b. ʿAbd Allah b. Abī al-Barakāt. The scribe is not named.

There is no mention that it belonged to anyone, and no date appears on it.

The Manuscript of al-Khizāna al-ʿāmma li-al-kutub wa-al-wathāʾiq in Rabat (ع)

This manuscript, listed as no. 1154 ك, contains more than one complete text, together with some pages of Fiqh on different subjects.

Following p. 557 of this manuscript is one page from this text, beginning:

الحمد لله : ومن كتاب بشائر الفتوحات والسعود في احكام
التعزيرات والحدود تأليف الفقيه ابي يحيى بن عبد الله بن ابي البركات الذي الفه
باشارة السلطان ابي عبد الله الثابتي رحمه الله ما نصه . فصل

This page contains part of one chapter[1] only of the text, i.e. part of that on Taʿzīrāt. The description of the manuscript is as follows:

It is an old manuscript, covered (as is all this collection) in brown leather; the paper is coarse and of a brownish colour. The size of the paper is $19\frac{1}{2}$ x $14\frac{3}{4}$ cm, the writing area covering 10 x $14\frac{1}{4}$ cm, on every page there are 26 lines, and in each line 15 - 17 words.

It is written in dark brown ink and in a Maghribi hand and is undated.

On the last page this paragraph is found:

وفيما ذكرناه كفاية وإرشاد إن شاء الله ولا حول
ولا قوة إلا بالله العظيم :
من خط بعض الفقراء الفاسيين
من كتب الكتبه الكتانيه لمالكها محمد عبدالحق الكتاني
بفاس . الموجوده الآن بالخزانه العامه بالرباط ،

It belonged to the al-Kittānī Library, the owner of which was ʿAbd al Ḥaqq al-Kittānī of Fez. All the books from this Library are now in al-Khizāna al- ʿāmma in Rabat.

Basha ir al-futūḥāt wa-al-suᶜūd

fi Aḥkām al-ta zirat wa-al-Ḥudūd

1. Al-Naṣirī, al-Istiqṣā', IV, 162.

2. Al-Fāsī, Muntakhabat, 89.

3. Nayl al-Ibtihāj, MS no. 1890, King al-Ḥasan II Library Rabat.

4. Kifāyat al-muḥtāj, MS No. 681, King al-Ḥasan II Library, Rabat.

5. Ibn Maryam, al-Bustān, 209.

6. Al-Tanbaktī, Nayl al-Ibtihāj, 359.

7. Al-Tanbaktī, Nayl al-Ibtihāj, 359, and Ibn al-Qāḍī, Durrat al-ḥijāl, 338, no. 1460.

The title Qāḍī al-Jamāᶜa, was a new title used in al-Andalus.

8. Al-Nubahi, Tārīkh al-quḍāt, 21.

9. Al-Tanbaktī, Nayl al-Ibtihāj, 330-331.

10. Nayl al-Ibtihāj, MS No. 1896 and al-Tanbaktī, Nayl al-Ibtihāj, 333.

11. Nayl al-Ibtihāj, MS, 42.

Kifāyat al-Muḥtāj, MS, 54.

12. Ibn Maryam, al-Bustān, 147-149. Al-Tanbaktī, Nayl al-Ibtihāj, 223-224, and al-Sakhawī, al-Durr al-lāmiᶜa, VI, 181.

13. Ibn Maryam, al-Bustān, 209. Al-Tanbaktī, Nayl al-Ibtihāj, 293-297. Kifāyat al-muḥtāj, MS, 54. Nayl al-Ibtihāj, MS, 42.

14. Al-Tanbaktī, Nayl al-Ibtihāj, 121.

15. Al-Khizāna al-Malakiyya, Muntakhabāt min-nawadir al-Makhtutat, 89.

Chapter 3

I. The Evolution of the Administration of Justice in Islam.

1. Justice as practised by the Arabs during the *Jâhiliyya*.

2. Judgement in Islām.

   The difference between *qaḍā'* and *iftā'*.

   The qualifications of a *qāḍī*.

   Judicature in Islām.

3. The Era of the Prophet.

4. The Era of the Orthodox Caliphs.

   Revocation of Judgements.

5. The Umayyad Era.

6. The ʿAbbāsīd Era.

II. The Development of Islāmic *fiqh*.

1. Abū Ḥanīfa.
2. Mālik.
3. Al-Shāfiʿī.
4. Aḥmad b. Ḥanbal.
5. The Wahhābī movement.
6. The Extinct Sunnī Schools
   a. Al-Awzāʿī
   b. Dā'ūd al-Isfahānī
   c. Al-Ṭabarī.
7. The Shīʿa
   a. The Imāmī or Jaʿfarī *madhhab*.
   b. The Zaydī *madhhab*.

Justice as practised by the Arabs during the Jahiliyya

Justice in the Jāhiliyya was administered on a tribal basis. Each member of a tribe had the right to enjoy its protection and to call for its help, while he had the obligation of defending it against any aggression, and of abiding by its traditions, customs and religion.[1]

The judicial function was normally exercised by the Shaykh, who might inherit the leadership of the tribe, but was generally elected. He was the one who represented the tribe in its foreign and domestic relations; besides, there were tribal customs which used to be applied for the execution of orders and for solving disputes between the members of his tribe and other tribes.[2] Justice was administered according to the traditional practices of the members of the same tribe, and those of other tribes. Differences in these practices depended, to some extent, on whether a tribe was sedentary or nomadic. Among the best known shaykhs of the Quraysh, for instance, were Hashim b. Abd Manaf and his son ʿAbdullāh b. Hāshim b. ʿAbd Manāf, Abū Ṭālib and ʿAbd al-Muṭṭalib al-ʿĀṣ b. Waʾil.[3] Others were Aktham b. Ṣafī[4] who was regarded as the best ruler of his time, and whose judgements were never contested, al-Ḥājib b. Zarā , of Tamīm, and ʿĀmir b. al-Ḍarb[5]

There was no written law, or recognised legal

principles on which these shaykhs based their judgements; they simply applied their tribal traditions, their experience, their own instincts for what was equitable and, in some cases, what they believed to be the tenets of their Judaism or Christianity.[6]

Some of the well-known Jāhilīs were, of course, still living when Islam emerged, such as Haram b. Quṭbah b. Sinān Al-Fazzārī, who used to arbitrate between the leaders of the Arabs, and whose judgements were never contested. He was commended by ʿUmar b. Al-Khaṭṭāb on his handling of the case of ʿAlqama and ʿĀmir b. al-Ṭufayl, who had had recourse to him to decide which of them was the better; he did not declare either of them to be the better, but said: "You are like the two knees of a brown camel, which alight together on the ground; each of you has characteristics which are not found in his peer, and each of you is a noble lord." Haram said to ʿUmar: "If I had said one word about it, the war would have restarted", i.e. the war between the two tribes. ʿUmar said to him: "The Arabs have justly made you their Judge."[7]

Hearings, at this period, were generally held in the shaykh's house or tent, although there were certain well-known places that were also used for the purpose, such as the Dār al-Nadwa and the Ḥaram in Makka, built by Quṣay, and the market of ʿUkāẓ.[8]

The aids to aiming at a judgement which, of course, varied from tribe to tribe, included:

1. Kihāna - divination.

2. Zajr and Ṭiyāra - taking auguries from birds.

3. Azlām - divining arrows.

4. Firāsa and Qiyāfa - scrutiny.

5. Bayyina and Yamīn - evidence (to be produced by the plaintiff), and an oath (to be sworn by the defendant.

The last aid is known to have been favoured by Qass b. Sāʿidat al-Iyādi.[9] One of the most famous Makkan legal occasions was Ḥilf al-Fuḍūl. This Ḥilf (agreement) was attended by the Prophet Muḥammad before his mission. The participants met in the house of ʿAbd Allāh b. Jadʿān, and agreed to help the appressed against the oppressor, and to obtain for anyone who was unjustly treated in Makka, whether he was a stranger or a native, a free man or a slave, the rights that were due to him, and the money or property that he claimed, either from themselves or from others.[10]

Judgements given in accordance with such agreements would be implemented without any need for sanctions, since the parties had respect for, and confidence in the arbitrator, which they attested by the promise they gave before the Council of Arbitration.[11]

When Islām came, it examined these methods of arriving at a judgement, confirmed some, rejected some, and modified others.[12]

Judgement in Islām

There is some difference between the fuqahā'in defining Qaḍā'. Some regard it as comprising all that is said by the judge which constitutes the decision, i.e. that it is "the statement of a legal (sharʿī) judgement with the purpose of obligation".[1] The majority of them, however, define qaḍā' as:

> A decision made between people in disputes to settle conflicting claims and to put an end to disagreement by means of legal evidence.[2]

The person who is entrusted with making this qaḍā' is called al-Qāḍī. The Qur'ān states,

> If thou judgest, judge between them with equity. Lo! Allah loveth the equitable.[3]

A large proportion of the Qur'ān is concerned with legal matters. Sūrat al-baqara, for example, contains so much legal material that ʿAbdAllāh b. ʿUmar used to spend eight years teaching it.[4] Al-Ṭabarānī relates, on the authority of Muʿāwiya b. Abī Sufyān, that the Prophet said:

> God does not respect as sacred a nation in which just judgements are not given, and in which a feeble person does not obtain his rights from a powerful one.[5]

There is another person concerned with the sharīʿa besides the qāḍī/Ḥākim: the Muftī, the official expounder of the law; his function is called Iftā', the giving of a legal opinion or the legal solution of a judicial question, Fatwā or Fatyā.

> They consult thee concerning women, say Allah giveth you decree concerning them.[6]

Assuming the office of Qāḍī is considered a fard kifāya (collective duty), so that one who refuses to be appointed as a judge bears no sin, if there is someone who will carry out this duty. For example, when ʿUthmān b. ʿAffān said to Ibn ʿUmar, "Judge among the people", he replied, "I do not give judgement between two persons".[7] There are many savants who abstain from being judges, because of the perils of the position, and they are not to be blamed for that, unless there is no other person who will carry out the task.[8] According to Mālik, "He must be compelled if there is nobody else"; but some ʿulamāʾ say, "He must not be compelled, even if there is nobody else!"[9]

The giving of a legal opinion is also considered to be a farḍ kifāya, so that it is not obligatory on a qualified person, if someone else can be found to do it.[10] The Prophet first instituted Iftāʾ, in which he was followed by the orthodox Caliphs and the Tābiʿūn.

The difference between qaḍāʾ and iftāʾ

There is really no difference between them except that the qaḍāʾ of a judge is binding while a fatwā is the statement of a general rule, which is not binding. A judge has to follow the pleas which comprise evidence, and confession, in addition to statements. a muftī, however, follows and applies the authorities, the Qurʾān, the Sunna, etc.

The qualifications of a Qāḍī

He should be a Muslim, sane, male, free, of legal age, just, educated, and sound of faculties (i.e. he should not be deaf, blind or dumb).[11] Women are allowed to hold the post of Qāḍī and to give judgement in all cases, according to the statement of Ibn Jarīr al-Ṭabarī. Others said that she could judge in everything except cases of Ḥudūd and Qiṣāṣ, which is the opinion of the majority.[12] The judge must be a respectable person.

The function of the judiciary is one of the most important in a state because it can protect the people from the arbitrary exercise of power, and through it the people may enjoy tranquility and security. Judgement is one of the attributes of God.[13]

> ... Then have patience until Allah judge between us. He is the best of all who deal in judgement.[14]

Judicature in Islām

The development of Judicature in Islām went through a series of stages, owing to differences in the interpretations of the texts on which it was based; this occurred when the Islāmic State was extended, various different nationalities came within it, fuqahā' emerged and schools of fiqh became numerous. We shall distinguish the following stages: the era of the Prophet; the era of the Orthodox Caliphs; the Umayyad era; the Abbasid era; the establishment of the various madhāhib; the Ottoman era; and the present era.

The Era of the Prophet

The Prophet was the first judge in Islām, "So, judge between them by that which Allāh hath revealed."[1] He used to base his judgements on the Qur'ān, as, for example, on Sūrat al-Majādala in the case of Khawla bint Thaʿlaba and her husband, Aws b. al-Ṣāmiṭ.[2]

> Allāh has heard the plea of her who disputes with thee in regard to her husband, and who complains to Allāh; Allāh is one who hears and clearly sees.

The Dispute:

The Prophet acted continuously as a judge and the Qur'ān prescribed his judicial pronouncements. For example, when Khawala bint Thaʿlaba, the wife of Aws al-Ṣāmiṭ, who had divorced her by the use of a pagan formula, appealed to the Prophet, he declared that the divorce was valid, but she pressed the matter and appealed to Allāh, with the result here given. This was the case also in the Ḥudūd for theft and for other offences. All of those punishments were inflicted on this basis. ʿUbāda b. al-Ṣāmit relates:

> We were with the Prophet in council, when he said: "Will you swear fealty to me, in that you will not be polytheists, or commit adultery, or theft, or murder, which God has forbidden, except for a just cause? Those of you who will abide by this, will receive their due recompense from God; if any one of you commits any of these offences and is penalized for it in this world, he will be purged of it if any one of you commits any of them and God conceals it, God will then deal with him, and if He wills He will pardon him, and if He wills He will punish him."

In one version the following words are added: "So we swore fealty to him in this." This saying was related by all the relators of the <u>Ḥadīth</u> except Abū Dā'ūd.[3]

The authority of the Law and of the judge is established by the following verse:

> But no, by your Lord, they can have no Faith, until they make you judge in all disputes between them, and find in their souls no resistance against your decision, but accept (them) fully with submission.[4]

The Prophet both handled the judicature himself and also delegated it to others, on a temporary basis, and for particular disputes. For example, it was delegated to ʿUmar b. Al-Khaṭṭāb, to ʿAlī b. Abī Ṭālib, and to Ḥudhayfa b. al-Yamānī,[5] each of whom handled one case only. When the area of the State was extended through conquest, such as, for example, the conquest of Yemen, the Prophet also appointed certain companions of his to handle the judicature and the Government, as when he sent Muʿādh b. Jabal to Yemen as both Judge and Governor. He also appointed ʿAttāb b. 'Usayd to Makka after its conquest, as its Judge and Governor.[6]

The Era of the Orthodox Caliphs

Abū Bakr followed the Prophet in his handling of the judicature and the government, in that he applied, in the first instance, in his judgements what he read in the Qur'ān. If he could not find a ruling in the Qur'ān that fitted the case, he would resort to the Sunna of the Prophet, as exemplified by any qawl (saying), fiʿl (act) or taqrīr (report) of his.[1] If, again, he could not find anything here, he would consult the people, since some person might remember a Sunna which others did not. If such was not forthcoming,[2] he would call upon the best of the Prophet's Companions in order to ask their opinion. ʿUmar b. Al-Khaṭṭāb also followed this practice during the first part of his caliphate but when the Islāmic State became more widespread, he could no longer deal with justice, government and defence himself.

The Judicature was thus separated from government, and it began to be delegated in the various Islāmic provinces, to judges who were appointed by the Caliph himself or by the Governor through a Commission issued by the Caliph.[3] Such judges did not decide cases concerned with qiṣāṣ or ḥudūd or taʿzīr penalties such as imprisonment; these were decided by the Caliph only, not even the appointed Governor having the authority to do so.[4] Abū Bakr, during his caliphate, appointed ʿUmar b. Al-Khaṭṭāb as a judge, and ʿUmar,

during his caliphate, appointed ʿAlī b. Abī Ṭālib, allegedly the best judge among the Prophet's companions.[5] They kept in their own hands decisions in cases involging ḥudūd and qiṣāṣ and employed their appointed judges only as auxiliaries for deciding disputes such as those to do with commercial matters and certain aspects of the Sharīʿa, for example, marriage and divorce. In effect, the jurisdiction of the appointed judges was restricted, at this period, to what we should call civil cases.[6]

There appears, on the whole, to have been only one judge in each province, with responsibility for all its judicial affairs. We know, for example, that the province of Damascus had only one judge.[7]

It seems that the judges' duties, during this early period, consisted largely of giving fatwās on the correct interpretation to be applied to Qur'ānic legislation and details of the sunna. "...We have neglected nothing in the Book (of Our decrees) ..."[8] For this reason each judge had attached to him a companion of the Prophet who was considered a suitable authority in jurisprudential matters. ʿUmar b. al-Khaṭṭāb was the first to despatch such consultants to various provinces, in order to give legal advice: ʿAbd Allāh b. ʿAbbās to Makka, Zayd b. Thābit and ʿAbd Allāh b. ʿUmar to Al-Madina, ʿAbd Allāh b. Masʿūd to Al-Kūfa, and ʿAbd Allāh b. ʿAmr b. al-ʿĀṣ to Eqypt.[9]

The judges had considerable freedom in exercising Ijtihād in their judgements, whether in words, or deeds, if there was nothing relevant to be found in the Qur'ān or the Sunna.[10]

They do not seem to have been called upon to make many difficult decisions during the periods of the Orthodox Caliphs and the Ummayyads, for it was a time of evaluation and development, and there seem to have been no cases, as mentioned previously, where written judgements were required. This was because the two parties in most disputes were essentially seeking interpretation (fatwā) and if the judge could provide this, they were satisfied with it, since it was based on principles derived from the Qur'ān and the Sunna, or on Ijtihād, or on consultation between men of authority in this field.

The execution of judgements was handled by the judges, but they rarely needed to exert their authority, since the litigants themselves would usually accept the given judgements and put them into effect.[11]

Revocation of Judgements

The judgement of a judge was not revoked if he had reached it by means of his Ijtihād. Even if he had formerly made a different judgement, in which he found he had made a mistake, he would not revoke it, because he had based it on proper Ijtihād. An explanation for this procedure is given by saying that a change

of opinion is similar to the abrogation of a text, since its effect will only apply to the future.[12] This is because the judge is not entitled to pass a sentence of *qiṣāṣ* or *ḥudūd*. There is a message of Caliph ʿUmar b. al-Khaṭṭāb, addressed to the first Judge he dispatched, which contains all the conditions which a judge must fulfil.[13]

Courts were held in mosques, and no special premises were provided.[14]

The Umayyad Era

The administration of justice during the Umayyad period continued much as it had during the period of the Orthodox Caliphs; judges passed judgements accordint to the *Qur'ān* and the *Sunna* and according to their *ijtihād*. There were, however, a number of developments that distinguished it from the previous period:

1. A judge was additionally entrusted with the consideration of cases of wounding.[1]
2. The recording and registration of judgements commenced, as a result of increasing disputes and recourse to litigation, as well as a more contentious attitude on the part of litigants than in the previous period.
3. A Supreme Court (*Maḥkamat al-Maẓālim*) which was the equivalent of our Court of Appeal, was established. This was presided over by the Caliph himself. It was established by ʿAbd al-Malik b. Marwān, who appointed one particular day of the week to look into complaints. Most of the cases which this court handled concerned the infringement by prominent persons, mostly from among the court and from the Umayyad class itself, of the rights of others.[2] ʿUmar b. ʿAbd al; Azīz, the successor of ʿAbd al-Malik b. Marwān, upheld the rights of other people against the Banū Umayya, when any judge failed to do so.
4. Clerks were employed in order to record the details of cases, including the statements of the litigants.

5. Witnesses were brought in to testify to the fact that the judgements issued by the judge were not inconsistent with justice and right.[3]

This period saw the recording in writing of the Ḥadīth of the Prophet, which is the second source of the Sharīʿa. This was necessitated by the fitna, the war between ʿAlī and Muʿāwiya, as a result of which ḥadīth proliferated, each side producing sayings favourable to itself. ʿUmar b. ʿAbd al ʿAzīz gave permission to Abū Bakr Muḥammad b. Ḥāzim, his deputy governor, to collect, for the first time, the ḥadīth that seemed to be authentic.[4]

The ʿAbbāsid Era

Under the ʿAbbāsids the Muslim State became something different. It was more extensive than any other State at that time, as a result of the conquest of the countries surrounding the Arabian Peninsula. Islām had become the religion of many different nations and cultures, and from this situation arose many arguments and differences of opinion on legal matters. ʿUmar b. ʿAbd al-ʿAzīz had started to collect the Prophet's Ḥadīth,[1] but it was the ʿAbbasīds who played a vital role in endeavouring to increase the power of the state while retaining the Sunna. Their aims were as follows:

1. To record the whole of the available Sunna in order to preserve it from subsequent alteration.
2. To establish the general principles of Uṣūl al-Sharīʿa.[2]

Al-Manṣūr asked Mālik to compile a book for the legal guidance of the people, requesting him to avoid the rigidity of Ibn ʿUmar, the permissiveness of Ibn ʿAbbās, and the contradictions of Ibn Masʿūd[3]

Al-Manṣur hoped that all nations would accept this book, but Malik said that this was impossible because, after the death of Muḥammad, various companions of his went to different countries and spread their knowledge there, so that each now had many followers.[4] There were, in any case, no fundamental differences in the basic rules between the various Madhāhib; there were

no real divergences from what was understood to be laid down in the Qur'ān and the Ḥadīth, but there were some differences in the exegesis - for example concerning ablution, as mentioned in the Qur'ān:

> O you who believe, when you intend to offer prayer, wash your faces and your hands (forearms) up to the elbows, rub (by passing wet hands over) your heads and your feet up to the ankles.[5]

Some Muslims understood that the feet should be rubbed as well, but others understood that the feet should be washed as well as the hands.[6] Many different madhāhib were established by individual fuqahā' between 132/749 and 310/922.[7]

Eventually the five present-day madhāhib prepond-erated, while others disappeared; four of these madhāhibs are Sunnī, the Ḥanafī School, the Mālikī, the Shāfiʿī School, and the Ḥanbalī School, and the fifth is Shīʿī, which is divided into many branches, Imāmī/Jaʿfarī, Zaydī, ʿAlawī, Ismāʿīlī, and others.

The high court (Maḥkamat al-Maẓālim) established by the Umayyads was continued under the ʿAbbāssids, with the Caliph sitting in it several times a week, instead of only once a week as originally intended. The Qāḍī[8] might occasionally preside in this court, but in general he represented the purely religious side of the law, whereas the Caliph represented the more secular side, such as questions of injustice.[9]

The post of Qāḍī al-Quḍāt, or Chief judge, is an

innovation of the ʿAbbāsīd period, indicating a certain detachment of the judiciary from the central authority, and a formalizing of its independence in its decisions. This is further indicated by the Qāḍīs being accorded a distinctive form of dress, and by the removal of the courts from the mosque to a specially designated location.[10]

The situation in the Maghrib and Andalus was the same. The Caliph or Amīr was the ultimate judge, because of the inseparability of religion and law.[11] The necessary qualifications for the position of Qāḍī in the West were also much the same as in the East. The Qāḍī had to be a Muslim, be free, have attained the age of puberty, be of known piety, and have a sense of justice and a good knowledge of the world, be sound in all his faculties, be articulate, and give no occasion for scandal in his conduct.[12]

Some fuqahā' allow a woman to be a judge. Al-Ṭabarī considers this to be permissible in all circumstances, whereas Abū Ḥanīfa considers it to be permissible only in those cases in which a woman's evidence is acceptable, that is to say in all cases except those concerned with ḥudūd and wounding (jarāḥ).[13]

There were some differences in the method of appointing a Qāḍī . In some cities, from the 3rd or 4th century, it was customary for the position to be passed on from father to son.[14]

The judicature, as it developed under the ʿAbbāsīds remained the basic pattern for the Arab Near East until the break-up of the Ottoman Empire. Thereafter, in most countries, only civil law continued to be subject to the *Sharīʿa*. This has remained stable until now, with the important exception that Iraq, two years ago, departed from the Qurʾānic prescriptions concerning inheritance, by allotting a daughter the same amount as a son.

The Development of Islamic fiqh

Jurisprudence (*fiqh*) developed in Islām chiefly as a result of the need to explain the Qur'ān and Sunna to the inhabitants of the new Arab empire who had embraced Islām. It began in about 50 A.D. and flourished for almost two centuries, in the course of which many schools (*madhāhib*) sprang up. Some of these proved more durable than others, notably, of course, in Sunnī Islām, the Ḥanafī, Mālikī, Shāfiʿī and Ḥanbalī *madhāhib*.

1. Abū Ḥanīfa

His full name was al-Nuʿmān b. Thābit. His grandfather Zayṭā is said to have been brought as a slave from Kabul[1] to Kūfa and set free by a member of the Arabian tribe of Tayyim Allāh b. Thaʿlabah. He and his descendants thus became *mawālī* of this tribe. However, according to another source, they were not the *mawālī* of anyone.[2]

Abū Ḥanīfa himself was born in Kūfa about the year 80/399 and lived there, working as a manufacturer and merchant of a kind of silk material (*khazz*). He also became a theologian and religious lawyer. His first teacher was a certain Imām ʿĀṣim;[4] he attended the lectures of Ḥammād b. Sulayman (d.120), who taught religious law in Kūfa and, perhaps on the occasion of a pilgrimage, those of ʿAṭā' b. Rabāḥ (d.114 or 115) in Mekka. Abū Ḥanīfa may even have lived in Makka for

a time after escaping at the end of the Umayyad reign who suffered from the governor of Kūfa, Ibn Hubayra, who had imprisoned him.[5] After the death of his teacher Ḥammād, he became the foremost authority on questions of religious law in Kūfa, and the main figure in the Kūfan School of Law. He had a large number of followers such as Abū Yūsuf (Yaʿqūb b. Ibrāhīm al-Anṣārī) an Arab, not a mawlā (113/731 - 182/798);[6] Muḥammad b. al-Ḥasan al-Shaybānī (132/749 - 189/804),[7] and Zufar b. al-Hadhal (d.158/774) and also Abū Ḥanīfa's son Ḥammād, and his grandson, Ismāʿil, who was Qāḍī in Baṣra and in Riqqa (d.212/827). He consistently refused to accept the position of Qāḍī, either under the Umayyads or the ʿAbbāsids, and suffered flogging and imprisonment for this refusal. His Alid sympathies appear to have been responsible for his reluctance to serve, and indeed his aid to rebels against the caliphate. It is uncertain whether, having been imprisoned by al-Manṣūr, he died in prison, or was eventually released but forbidden to promulgate any fatwās.[8]

2. Mālik

His full name was Mālik b. Anas, b. Abī ʿĀmir al-Ṣaḥābī, b. ʿAmr b. al-Ḥārith al-Aṣbaḥī al-Ḥimyarī.[1] There is another tradition about his descent, some authors saying that it was from a client of the Banū Tayyim.[2] In any case, he is said to be a descendent of Qaḥṭān.[3]

There is dispute as to his mother's name and origin. Some say that her name was al-ʿĀliya bint Sharīk from Banī-Qaḥṭān, the same tribe as his father, and others say that she was Ṭulayḥa, a client of ʿAbdAllah b. Muʿammar of the Banū Tamīm.[4]

He was born in Dhū al-murʾuwwah[5] some time between the years 90/709 - 97/716.[6] He is alleged to have spent either two or three years in his mother's womb.[7] The date of his death is well-established as 179/790.[8] He was buried in al-Baqīʿ, in al-Madina.

Late sources indicate that Mālik may have studied with the celebrated Rabīʿa b. Farūkh. He also studied with Ibn Hirmiz, Nāfiʿ, Ibn Shihāb, Muḥammad b. al-Munkadir and others.[9]

He was known as ʿĀlim al-Madīna or Imām Dār al-Hijra, being one of the first scholars in Madina to develop and systematize the study of jurisprudence.[10] He was also distinguished in Qurʾān reading and exegesis, and to a lesser degree in theology and astronomy.[11]

His greatest work is *Kitāb al-Muwaṭṭaʾ*, which, with one exception[12], is the earliest surviving book on Muslim Law. Its object was to give a survey of Law and Justice and of the ritual and practice of the Muslim religion as represented by the practice of the Sunna during and since the Prophet's time, and to establish criteria for *Ijmāʿ* (and *Qiyās*), based on the Sunna, before it was forgotten or corrupted.

The success of al-Muwaṭṭa' was due to the fact that it was based essentially on the Qur'ān and Ḥadīth; it represents a transition from the simple fiqh of the earliest period of Islām to the amalgamation of Islāmic Law and the customary law of al-Madina, which produced the Ḥadīth of the later period.[13]

It is said that Mālik wrote it at the request of al-Manṣūr for a book based on principles less strict than those of Ibn ʿUmar, yet stricter than those of Ibn ʿAbbās would allow. [14]

According to al-Shaybānī, many of the tranditions Mālik included in al-Muwaṭṭa' were "from later authorities".[15] The classification of the Ḥadīth in the Mālikī madhhab, either in the Muwaṭṭa' or in Soḥnūn's Mudawwana represents "a harmonizing interpretation of tradition."[16] Although Ḥadīth played an important role in the formulation of Mālik's doctrines and in his reasoning, to some extent he ignored it, because of the practical difficulty of its application. Much of the Muwaṭṭa''s success stems from the fact that its author takes up an intermediate view on disputed points, combining an extensive use of Ra'y with respect for the "living tradition".[17]

His doctrines were distinguished by the fact that they followed Medinese usage. This caused many fuqahā' to reject his methods; but considered that the Medinese were better interpreters of the Ḥadīth and the Sunna than anyone else because Muḥammad had lived there; it was for

this reason that he always said: "Our practice is ..."

Two important principles that he enunciates, which are most frequently applied in the Mālikī Madhhab are:

a) Sadd al-dharā'iʿ, which states that there is no need to root out the source from which something offensive may derive, as in the case of the vine which is the source of alcoholic drink;[18] and

b) Taḥkim al ʿawā'id, which states that one should respect customary practices. For example, when Hind, Abū Sufyān's wife, asked Muḥammad if she was allowed to take money from her husband's pocket without his knowledge, Muḥammad said that she might do as had been her custom.[19]

The Mālikī madhhab has always been the predominant one in the Maghrib (and was, formerly, in Andalus). The reason for this is that, according to Ibn Khaldūn, jurists from these territories principally visited the Ḥijāz for purposes of study. The only alternative, in early days, was Irāq, which was much less convenient to get to. Furthermore, in their origins and in their way of life, the inhabitants of the Maghrib and Andalus had more in common with the people of the Ḥijāz than with those of Irāq.[20]

The principal transmitters of the Mālikī madhhab to the Maghrib were Yaḥyā b. Yaḥyā b. Kathīr al-Layth, 234/848, ʿĪsā b. Dīnār 212/817, Abū ʿAbd Allāh Ziyād b. ʿAbd al-Raḥmān al-Qurṭubī, whose laqab was Shabṭūn 193/808,

Asad b. al-Furāt, 213/828, and ʿAbd al-Salām b. Saʿīd al-Tanūkhī, whose laqab was Saḥnūn,191/806.[21]

3. Al-Shāfiʿī

His full name was Muḥammad b. Idrīs b. al-ʿAbbas b. ʿUthmān b. Shāfiʿ b. al-Sa ib b. ʿUbayd b. ʿAbd Yazīd b. Hāshim b. al-Muṭṭalib b. ʿAbd Manāf.

This means that he was Hāshimī, Muṭṭalibī and Qurashī. His ancestor Abd Manāf was the great-grandfather of the Prophet Muḥammad.[1] His mother was from the Azd tribe.[2] He was born in Ghazza in 150/767.[3] His mother used to take him frequently from Ghazza to Makka[4] to acquaint him with his relatives on both sides. He lived for some time with the Banū Adad and Banū Hudhayl.[5] His first teacher was Muslim b. Khālid al-Zanjī Shaykh al-Ḥaram al-Makkī· he later went to al-Madina to study with Mālik. After Mālik's death he went to Baghdad twice[6] where he studied Ḥanifī fiqh under al-Shaybānī and Abū Yūsuf.[7] His was a traditional school, in that he followed the Sunna as established only by tradition going back to the Prophet, not by practice or consensus.[8] However, he used raʾy in his earliest period, as practised by the Ḥanafis. He also used qiyās and ijtihād,[9] the latter, however, only very rarely, when there was no alternative.

He taught Qurʾānic exegesis, the interpretation of hadīth, grammar and prosody.[10]

Al-Shāfiʿī is unusual in that he altered his views in the course of his career. In the first period he produced fatwas that combined the Mālikī and Ḥanafī

position, but when he moved to Egypt and published his book, he presented views of his own. There are not really very many differences between his views in these two periods; he did not entirely abrogate all those that he had held earlier, but he did modify them somewhat. He withdrew his first <u>madhhab</u> as a system to follow,[11] but this was not altogether effective, since some of his followers continued to combine elements from both.

His death took place in Egypt in 204/819 at the age of 54. There are two versions of the manner of his death. One is that he was assaulted by followers of Mālik when he produced his book attacking Mālik, <u>Khilāf Mālik</u>.[12] The other is that he suffered from haemorrhoids and died of a haemorrhage.[13]

4. <u>Aḥmad b. Ḥanbal</u>

His full name was Aḥmad b. Muḥammad, b. Ḥanbal b. Hilāl al-Shaybānī, and he was a full-bred Arab by his father and his mother, who were both from the Shaybānī tribe.[1] He was known as the Imām of Baghdad, and was a celebrated theologian jurist and traditionist. He was born and died in Baghdad in 164/780 and 241/855 [2] respectively, dates given by his sons Abd Allāh and Ṣālih.

His family originally lived in Basra, then moved to Marw-Sarkhas[3] a district of Khurāsān, with his grandfather,[4] Ḥanbal b. Hilāl, who was governor of Sarkhas, under the Umayyads. He was one of the propagandists of the ʿAbbāsīds, and therefore moved to Baghdad when they came to power.

Ibn Ḥanbal was an extremely strict follower of the Sunna of the Prophet, and the founder of one of the four major Sunni Madhāhib, the Ḥanbali.

His teacher

His first studies were in Iraq with the ʿUlamāʾ al-Ḥadīth.[5] When he reached the age of sixteen, he followed a certain Hāshim b. Bashir b. Ḥāzim al-Wāsiti for four years.[6] Later, after he had studied a great number of hadiths and fatwas, he turned to the study of fiqh. He studied under al-Shāfiʿī, although he was not wholly satisfied with his teaching. Therefore he made a series of journeys, in Iraq, the Ḥijāz, Yemen and Syria in order to visit the ʿUlamāʾ of these different regions.[7]

The Ḥanbalī madhhab was one that relied on the Qurʾān and the Ḥadīth. Ibn Ḥanbal had an aversion to the use of raʾy. He was distinguished as a Salafī,[8] which means he followed the Prophet and his companions and applied the Sunna.[9]

Ibn Ḥanbal's doctrines and dogma did not spread far in his own lifetime. The principal reason for this was that the other three early madhāhib were already well established. The Ḥanafī madhhab dominated Baghdad and Iraq in general, as well as many other parts of the Muslim world. This was because when al-Rashīd appointed Abū Yūsuf as a judge in Baghdad, he gave him the right to appoint to other such posts, and to send judges to other countries; thus all Qādīs were from his madhhab, the Ḥanafī. The Shāfiʿī madhhab was influential in Egypt and Syria and the Mālikī in Maghrib. The Ḥanbalī madhhab was a late-

comer and so very slow to start moving. It was also very strict in some respects, which made it not easily acceptable to some. Some of the ʿUlamāʾ, such as al-Ṭabarī and Ibn ʿAbd al-Birr, counted Ibn Ḥanbal among the traditionists (Muḥaddithin) rather than among those jurists qualified to use independent reasoning (mujtahidin).[10]

5. The Wahhābī movement

In 1115/1703[11] Muḥammad b. ʿAbd al-Wahhāb was born in ʿUyayna, in Nejd. He followed the dogma and doctrines of Ibn Taymiyya and his pupil Ibn Qayyim al-Jawziya, and became famous as a reformer of the Ḥanbalī madhhab in Nejd and throughout the Arabian Peninsula during the reign of ʿAbd al-Azīz al-Suʿūd.[12]

Muḥammad b. ʿAbd al-Wahhāb was third only to Ibn Taymiyya and Ibn Qayyim al-Jawziya in reviving the Ḥanbalī madhhab; he returned to the religious spirit of his forefathers who followed[13] the Salafiyya in the basic principles of their religion, and referred only to the Qurʾān and the Sunna of the Prophet. He basically followed the doctrines of the Ḥanbalī madhhab, but as he promulgated some Fatwās of his own, he may also be said to have been independent in some of his doctrines and not entirely a Muqallid. He wrote three books: Risalat al-Qawāʿid al- Arba , Kitāb Kashf al-Shubūhāt and Kitāb Masāʾil al-Jāhiliyya. He died in 1206/1791.[14]

6. The Extinct Sunnī Schools

There were other Sunni madhāhib which did not survive. Of some of these we know little except the names of the Fuqahā' who founded them, such as ʿAbdAllāh b. Shubrama (d.144/761), Muḥammad b. ʿAbd al-Raḥman b. Abī Layla, the Kūfan judge (d.148/765), Sufyān al-Thawrī (d.161/777), al-Layth b. Saʿd (d.175/791), Sharīk al-Nakhaʿī (d.177/793), Sufyān b. ʿUyayna (d.198/813). Isḥāq b. Rāhawayh (d.238/852) and Ibrāhim al-Baghdadī Abū Thawr (246/860).[1]

There are three about whom we know rather more, namely:

1. al-Awzāʿī: he was known as al-Imām Abū ʿAmr ʿAbd al-Raḥmān b. ʿAmr al;Awzāʿī,[1] being originally from the tribe, al-Awzāʿ, or alternatively from a village of that name near Damascus.[2] He was born in Baʿlbak in 88/707. He lived in Beirut until he died in 157/773, and is buried there. His madhhab was Syrian but it spread as far as Andalus. By the 3rd century A.H. it had become extinct. He relied principally on Ḥadīth;[3] for example, he did not agree with Abū Ḥanīfa on the punishment of execution. Abū Ḥanīfa had stated that on the battlefield an army commander had no right to execute a criminal until he arrived back in his own country; al Awzāʿī did not agree, stating that the Qur'ān and the Ḥadīth had not mentioned such a case in a state of war.[4] Although pressure was put on him to become a judge, he declined to do so.

b. Dā'ūd al-Isfahānī:[1] better known as Abū Sulaymān al-Ẓāhirī, was born in Kūfa in 201/816 and died there in 270, but originally he was an Isfahānī who lived in Baghdad. His madhhab followed the Sunna exclusively, accepting only what they understood to be the literal meaning of the texts and demonstrating total aversion to ra'y and qiyās:[2] "If you differ in anything among yourselves, refer it to Allāh and His Apostle."[3] His madhhab spread to Andalus, where it was practised until the 5th century;[4] it had disappeared completely by the 8th century. A very important follower of this madhhab was Ibn Ḥazm who wrote many books on it, such as Kitāb al-Iḥkām Li Uṣul al-Aḥkām, al-Muḥalla, and al-Faṣl fi al-Milal al-Ahwā' wa al-Niḥal. It is interesting to note that he had some doctrines which are similar to modern Western theories. For example, this school is the only one in Islām which stipulates that a poor husband is to receive alimony from a rich wife.[5]

c. Al-Ṭabarī : Abū Ja'far Muḥammad b. Jarīr al-Ṭabarī (224-310)[1] was born in Āmul in Ṭabaristān. He lived in Baghdad where he distinguished himself in several fields of learning. He was a travelling Jurist and studied the jurisprudence of Mālik, al-Shāfi'ī, and Abū Ḥanifa. Later, he founded his own madhhab which gained followers in Baghdad. It ceased to exist in the middle of the 5th century.

He wrote many books, such as al-Laṭīf, al-Khafīf, al-Basīṭ, al-Āthār, and Ikhtilāf al-Fuqahā', and, in history, al-Rusul wa al-Mulūk.[2]

7. The Shīʿa

There are a great number of sub-divisions within Shīʿa Islām; some indeed are so extreme in their views as almost to cease to count as Muslims at all.

The Jaʿfarī Shīʿīs accept only traditions that go back, in their view to the Āl al-Bayt and their own Imāms. They believe that the door of Ijtihad is still open to those who are qualified to exercise it, and that it will never be shut. They reject qiyās and ijmāʿ, as long as they have their Imāms, who have direct knowledge of the provision of the divine law.

The Imāmī or Jaʿfarī madhhab

This is the main Shīʿī madhhab. They follow Imām Jaʿfar al-Ṣādiq, and his father Muḥammad al-Bāqir, who practised jurisprudence;[1] many scholars quoted from their Fiqh, such as Abū Ḥanīfa and Mālik. They also disapprove of Ra'y.[2]

The Zaydī madhhab

Of the other main branches of Shīʿa, one is the Zaydī which follows Imām Zayd b. ʿAlī b. al-Ḥusayn b. ʿAlī b. Abī Ṭālib who sought to wrest power from the Umayyads in the Reign of Hisham b. ʿAbd al-Malik. There are many variations of jurisprudence in this Madhhab. It is followed principally in the Yemen.[1]

1. Justice as practised by the Arabs during the Jahiliyya

1. Ibrāhīm, *al-Qaḍā' fī al-Islām*, 26.
2. Arslān, *al-Qaḍā' wa al-quḍāt*, 44.
3. Ibrāhīm, *al-Qaḍā' fī al-Islām*, 26.
4. Arslān, *al-Qaḍā' wa al-quḍāt*, 48.

   Ibrāhīm, *al-Qaḍā' fī al-Islām*, 29.
5. *Ibid*.
6. *Ibid*.
7. *Ibid*., 30.
8. Al-Qāḍī Iyāẓ, *Tartīb al-madārik*.
9. Ibrāhīm, *al-Qaḍā' fī al-Islām*, 33.

   Arslān, *al-Qaḍā' wa al-quḍāt*, 50.
10. Ibrāhīm, *al-Qaḍā' fi al-Islām*, 32.
11. *Ibid*., 30.

    Ḥasan Ibrāhīm, *Tārīkh al-Islām*, 328.
12. Ibrāhīm, *al-Qaḍā' fī al-Islām*, 34.

2. Judgement in Islām

1. Ibn Farḥūn, *Tabṣirat al-Ḥukkām*, I, 12.

   Ibrāhīm, *al-Qaḍāʾ fī al-Islām*, 5.

2. Ibid., 7.

3. *Qurʾān*, V, 42.

4. Ibn al-ʿArabī, *Aḥkām al-Qurʾān*, 8.

5. Ibn Ḥayyān, *Akhbar al-quḍāt*, I, 37.

6. *Qurʾān*, IV, 127.

7. Al-Nubāhī, *Tārīkh al-Quḍāt*, 11-17.

8. Ibrāhīm, *al-Qaḍāʾ fī al-Islām*, 9.

9. *Ibid*.

10. *Ibid*.

11. Ibn Qayyim al-Jawziyy , *Aʿlām al-muwaqqiʿīn*, I, 12.

12. ʿAlī Manṣūr, *al-Madkhal*, 205.

    Ibn ʿArnūs, *Tārīkh al-quḍāt*, 86.

    Al-Ṭabarī, *Ikhtilāf al-fuqahāʾ*, 17.

13. Ibrāhīm, *al-Qaḍāʾ fī al-Islām*, 9.

14. *Qurʾān*, VII, 87.

3. The Era of the Prophet

1. Qur'ān, V, 51.

3. Ibn Ḥazm, al-Muḥallā, XI, 124.

3. Al-ʿAynī, Sharḥ Ṣaḥīḥ al-Bukhārī, XXIII, 273.

4. Qur'ān, IV, 65.

5. Ibrāhīm, al-Qaḍā' fī al-Islām, 36-38.

6. Ibid., 39-43.

4. The Era of the Orthodox Caliphs

1. Al-Khuḍarī, *Tārīkh al-tashrī‘*, 29.

2. Ibrāhīm, *al-Qaḍā’ fī al-Islām*, 47.

   Ibn ‘Arnūs, *Tārīkh al-qaḍā’*, 19.

3. Ibrāhīm, *al-Qaḍā’fī al-Islām*, 45-46.

   Ibn ‘Arnūs, *Tārīkh al-qaḍā’*, 24.

4. Ibn ‘Arnūs, *Tārīkh al-qaḍā’*, 25.

   Ibrahim, *al-Qaḍā’ fī al-Islām*, 50-51.

5. Ibn ‘Arnūs, *Tārīkh al-qaḍā’*, 12.

6. Al-Khuḍarī, *Tārīkh al- umam al-Islā miyya*, 458.

7. Ibrāhīm, *al-Qaḍā’ fī al-Islām*, 51-53.

8. Qur’ān, VI, 38.

9. Ibn Qayyim al-Jawziyya, *A‘lām al-muwaqqi‘īn*, I, 23-25.

10. Ibn ‘Arnūs, *Tārīkh al-qaḍā’*, 26.

    Ibrāhīm, *al-Qaḍā’ fī al-Islām*, 48.

11. Ibn ‘Arnūs, *Tārīkh al-qaḍā’*, 27-28.

12. Ibn ‘Arnūs, *Tārīkh al-qaḍā’*, 29.

13. Ibn Qayyim al-Jawziyya, *A‘lām al-muwaqqi‘īn*, I, 97-98.

14. Ibrāhīm, *al-Qaḍā’ fī al-Islām*, 52.

5. The Umayyad Era

1. Ibrāhīm, *al-Qaḍā' fī al-Islām*, 54-55.

2. Ḥasan Ibrāhīm, *al-Nuzum al-Islamiyya*, II, 381-383.

3. Al-Kanadī, *Kitāb al-qaḍā'*, 423.

4. Ibrāhīm, *al-Qaḍā' fī al-Islām*, 57-60.

   Ibn ʿArnūs, *Tārikh al-qaḍā'*, 39.

6. The ʿAbbāsid Era

1. Ibn ʿArnūs, _al-Qaḍā', fī al-Islām_, 39.

2. Ibn Farḥūn, _al-Dībāj_, 25.

   Ibrāhīm, _al-Qaḍā' fī al-Islām_, 67.

3. Ibn Faḥun, _al-Dībāj_, 25.

   Ibrāhīm, _al-Qaḍā' fī al-Islām_, 67.

4. Ibn Farḥūn, _al-Dībāj_, 25.

5. Qur'ān, V, 6.

6. See the grammar book of ʿAlī Jawdat, 173-174, for the interpretation of this verse.

7. Ibrāhim, _al-Qaḍā' fī al-Islām_, 61.

   Abū Rīda, _al-Ḥaḍāra al-Islāmiyya_, I, 369.

8. Ibrāhīm, _al-Qaḍā' fī al-Islām_, 153.

   Al-Maqrīzī, _al-Khuṭaṭ_, II, 207.

9. Abū Rīda, _al-Ḥaḍāra al-Islāmiyya_, I, 409.

10. Ibrāhīm, _al-Qaḍā' fi al-Islām_, 79-90.

11. Ibn Farḥūn, _Tabṣira_, I, 23-24.

12. Ibrāhīm, _al-Qaḍā' fī al-Islām_, 168-172.

13. Ibn ʿArnūs, _Tārīkh al-Qaḍā'_, 85-86.

14. Abū Rīda, _al-Ḥaḍāra al-Islāmiyya_, I, 407-408.

    Ibrāhīm, _al-Qaḍā' fī al-Islām_, 97-98.

    Ibn al-Jawzi, _al-Muntaẓam_, 174.

1. *Abū Ḥanīfa*

1. E.I., I, 123.

   Muḥammad Ismaʿīl, *al-Madhāhib*, 45.

   Abū Zahra, *Abū Ḥanīfa*, 12.

2. Ibid., 12-13. Abū Ḥanīfa's grandson Ismāʿil said "We have no servitude at all."

3. E.I., I, 123; Muḥammad Ismāʿīl, *al-Madhāhib*, 45.

   Abū Zahra, *Abū Ḥanīfa*, 12.

4. Ibid., 18.

5. Ibid., 34.

6. Ibid., 197.

7. Ibid., 206.

8. Ibid., 217.

2. Mālik

1. Ibrāhīm, al-Qaḍā' fī al-Islām, 75.

Al-Ḥasanī, Anwār al-masālik, 321, says that he was a Yemeni, and a client to Quraysh with Banī Tayyim in the words Mawlāhilf lā mawla ʿitāqah , 331.

2. Ibn Farḥūn, al-Dībāj, 17.

3. Ibid., and al-Khūlī, Mālik b. Anas, 25-36.

4. Al-Qāḍī ʿIyāẓ, Tartib al-madārik, I, 16.

Ibn Farḥūn, al-Dībāj, 17.. Her name is given as al-Ghāliya in al-Dībāj, in Tartīb al-madārik and in Anwār al-nasalik as al-ʿĀliya bint Sharīk b. ʿAbd al-Raḥmān al Azadiyya. 321

5. Al-Samhūdī, Wafā' al-wafā', II, 182.

6. See al-Dhahabī, Ṭabaqāt al-ḥuffāẓ, I, 198, and al-Maḥmaṣānī, Falsafat al-tashrīʿ, 40. Yaḥyā b. Bakīr was born 93/711 in the reign of Sulaymān b. ʿAbd al-Malik b. Marwān.

7. Ibn Farḥūn, al-Dībāj, 18.

8. Al-Khūlī, Mālik b. Anas, 297.

9. Ibn Farḥūn, al-Dībāj, 21-22 and al-Ḥasanī, Anwār al-masālik, 325-326.

10. E.I., III, 208.

11. Ibn Farḥūn, al-Dībāj, 26-27.

12. The "Corpus Juris" of Zayd b. ʿAlī, E.I., III, 206.

13. Ibn Farḥūn, al-Dībāj, 25.

Ibrāhīm, al-Qaḍā' fī al-Islām, 67, and Sharḥ al-Muwaṭṭa' with commentary of al-Zarqānī, 8.

14. J. Schacht, The Origins of Muhammadan Jurisprudence, 22.

15. Loc. cit.

16. J. Schacht, The Origins of Muḥammadan Jurisprudence, 23.

17. Ibid., 311.

18. Mālik, al-Muwaṭṭa', II, 161, and al-Abḥāth al-sāmiya, 53-54.

19. Ibid., 56.

20. Ibid., 58-59.

21. Ibn Khaldūn, al-Muqaddima, 392.

3. Al-Shāfiʿī

1. Al-Ziriklī, al-Aʿlām, VI. 249.

   Abū Zahra, al-Shāfiʿī, 15, "al-Shāfiʿī declared that he was a relative of the Prophet, therefore he got his share of the booty."

2. There are also differences of opinion about the identity of his mother, some say that she was Fātima the daughter of ʿAbd Allāh b. al-Ḥusayn b. al-Ḥasan b. ʿAlī b. Abī Ṭālib, but the popular belief was that his mother was from the Azd tribe. Abū Zahra, al-Shāfiʿī, 16.

3. There are also differences of opinion about his birth. Some say that he was born in ʿAsqalān, 3 miles from Ghazza, but al-Shāfiʿī himself said: "I was born in Yemen but my mother brought me to Mekka so that I would not lose sight of my relatives". Abū Zahra, al-Shāfiʿī, 14.

4. Ismaʿīl, al-Madhāhib, 98, al-Ziriklī, al-Aʿlām, VI, 250.

5. Abū Zahra, al-Shāfiʿī, 18.

6. Al-Ziriklī, al-Aʿlām, VI, 249.

7. Abū Zahra, al-Shāfiʿī, 9.

8. Ibid., 11, and Shacht, The Origins of Islam, 77.

9. Abū Zahra, al-Shāfiʿī, 34.

10. Schacht, The Origins of Islam, 120.

    Abū Zahra, al-Shāfiʿī, 11.

11. Abū Zahra, al-Shāfiʿī, 349, according to al-Buwayṭī.

12. Abū Zahra, al-Shāfiʿī, 31, according to Yāqūt, al-Muʿjam.

13. Ibid.

4. Aḥmad b. Ḥanbal

1. Muḥammad Ismāʿīl, al-Madhāhib, 124-125.

2. E.I., I, 272, Muḥammad Ismāʿīl, al-Madhāhib, 124.

3. E.I., I,272, mentioned Marw (the city), Muḥammad Ismaʿīl, al-Madhāhib, p.125 .

4. Aḥmad b. Ḥanbal did not know his father, who died before or soon after his birth. Muḥammad Ismaʿīl, al-Madhāhib, 125.

5. Muḥammad Ismāʿīl, al-Madhāhib, 131.

6. Ibid.

7. E.I., I, 272.

8. Ibid.

9. Ibn Ḥanbal, in his desire to follow the Prophet in all respects, obtained his wife's permission to take a concubine. He is said to have been reluctant to take one, but he nonetheless had six sons by her.

10. See Ibn al-Nadīm, al-Fihrist, Ibn ʿAbd al-Barr does not mention the biography of Ibn Ḥanbal in al-Intiqāʾ fī faḍāʾil al-fuqahāʾ.

11. Al-Maḥmaṣānī, Falsafat al-tashrīʿ, 52.

12. Muḥammad Ismāʿīl, al-Madhāhib, 143. Al-Maḥmaṣānī, Falsafat al-tashrīʿ, 52.

13. E.I., I, 272, and Abū Zahra, Ibn Ḥanbal, 400-401.

14. Al-Maḥmaṣānī, Falsafat al-tashrīʿ, 52.

The Extinct Sunnī Schools

1. Al-Maḥmaṣānī, *Falsafat al-tashrīʿ*, 54.

Al-Awzāʿī

1. Al-Maḥmaṣānī, *Falsafat al-tashrīʿ*, 54, and al-Ziriklī, *al-Aʿlām*, IV, 94. His grandfather's name was Muḥammad.
2. Al-Maḥmaṣānī, *Falsafat al-tashrīʿ*, 55.
3. He adhered strictly to *Ḥadith*, without admitting the possibility of using any other criterion.
4. Al-Shāfiʿī, *al-Umm*, 322-323.

Dāʾūd b. ʿAlī al-Iṣfahani

1. Al-Ziriklī, *al-Aʿlām*, IV, 94.
2. *Ibid*., III, 8.
3. Qurʾān, IV, 59.
4. See Ibn Ḥazm, *al-Aḥkām*, I, 9; VI, 160; VII, 55-56.
5. Ibn Ḥazm, *al-Muḥallā*, X, no.1930.

Al-Ṭabarī

1. Al-Ziriklī, *al-Aʿlām*, VI, 294.
2. Al-Maḥmaṣānī, *Falsafat al-tashriʿ*, 58.

7. The Shīʿa

a. The Imāmī Madhhabs

1. Al-Khuḍarī, *Tārīkh al-tashrīʿ*, 192-193.

   Ibn ʿArnūs, *al-Qaḍāʾ fī al-Islām*, 62.

2. Al-Ḥusaynī, *al-Fiqh al-Jaʿfarī*, 11-15.

b. The Zaydī Madhhab

1. Ibn ʿArnūs, *al-Qaḍāʾ fī al-Islām*, 62.

   Al-Khuḍarī, *Tārīkh al-tashrīʿ*, 191-192.

Chapter 4

The Ḥudūd

I. Al-Zinā (Adultery/Fornication)

The Ḥadd for Adultery

The Penalty of Lashing

The Penalty of Banishment

The Penalty of Stoning

Executing an Adulterer

Infliction of the Ḥadd on the Sick

Conditions for the Infliction of the Ḥadd

Sexual Intercourse for which no Ḥadd is to be inflicted

Proof of Adultery

Evidence

The Appearance of Pregnancy in Unmarried Women

The Ḥadd for Slaves

Inflicting the Ḥadd on Slaves

II. Al-Qadhf (Defamation)

III. Al-Ridda (Apostasy)

IV. Al-Ḥarāba (Irreligious Militancy)

The Penalty

V. Al-Sariqa (Theft)

ʿĀriya/ ʿAwārī (loans)

The Ḥadd of Amputation

Confession

The Method of Amputation

When Amputation shall be imposed and
when it shall not

Those who shall not suffer Amputation

The Hadd applied to Slaves (Mamalik)

VI. Al-Baghy (Rebellion?

VII. Al-Shurb (Drinking of Alcohol)

Nabīdh

The Ḥadd for drinking liquor

Evidence

The Ḥadd for Slaves

The Ḥudūd

Ḥudūd Crimes:

The Ḥudūd are penalties determined for the satisfaction of the rights of Almighty God or for the sake of the community. When the Fuqahā' say that a penalty is "a right of Almighty God", they mean that it cannot be abrogated, either by individuals or by communities. They consider that the penalty is a right of God whenever the public interest merits it; this means the protection of the people from corruption and the preservation of their property, honour and safety.

The penalties determined for the Ḥudūd crimes are distinguished in that:

1. They were set up to discipline the criminal, and in their infliction there is no scope for taking the personality of the culprit into consideration.
2. Each one, although conventionally considered as one ḥadd, in fact takes into account two ḥadds, that is to say, it respects both the right of God, and the right of man in the particular matter; they are determined, specified, specific and obligatory penalties and therefore the judge cannot reduce them or add to them, nor can he substitute anything else for them.
3. They were established on the basis of combating motives leading to a crime by means that discourage the crime.

There are seven crimes to which Ḥudūd penalties are applied:

I. Al-Zinā (Adultery/Fornication)

II. Al-Qadhf (Defamation)

III. Al-Ridda (Apostasy)

IV. Al-Ḥarāba (Irreligious Militancy)

V. Al-Sariqa (Theft)

VI. Al-Baghy (Rebellion)

VII. Al-Shurb (Drinking of Alcohol)

Some of these crimes, as found and specified in the Sharīʿa are also in the Mosaic Law.

These crimes are considered by the Mosaic Law to be crimes and acts which are harmful to mankind, and their penalty is the fine, the small privation and the big privation, lashing and killing.[1]

And God spake to Mosa all those words saying:

...(13) Thou shalt not kill.

(14) Thou shalt not commit adultery.

(15) Though shalt not steal.

(16) Thou shalt not bear false witness against thy neighbour.

(17) Thou shalt not covet they neighbour's house, though shalt not covet thy neighbour's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor anything that is thy neighbour's.[2]

In the Qur'ān God said,

... These are the limits ordained by Allah, so do not transgress them. And whoever transgresses the limits ordained by Allah then such are wrong-doers.[3]

I. Zinā (Adultery/Fornication

Zina is defined as "Any sexual intercourse without proper marriage (nikāḥ) or quasi-marriage, or with an owned slave (concubine)." This is a definition approved by the ʿUlamāʾ, even though disagreed about in detail.[4]

What is meant by quasi-marriage (shubha) is the occurrence of the act with a woman when the doer of the act thought that she was legally permissible for him, for example, if a man has intercourse with the female slave of his father, or one whom he had a share in buying, such as a female slave whom he and his brother had bought or he and his friend had bought.[5]

The Ḥadd for Adultery:

The ḥadd for adultery in the Mosaic law:

Deuteronomy.

22. If a man be found lying with a woman married to an husband, then they shall both of them die, both the man that lay with the woman, and the woman: so shalt thou put away evil from Israel.

23. If a damsel that is a virgin be betrothed unto an husband and a man find her in the city and lie with her:

24. Then ye shall bring them both out unto the gate of the City, and ye shall stone them with stone that they die; the damsel, because she cried not, being in the city and the man, because he hath humbled his neighbour's wife: so thou shalt put away evil from among you.[6]

Ḥadd al-zinā in the Sharīʿa is the penalty stated in the Qurʾān, and confirmed by the Sunna of the Prophet. God said:

> The adulteress and the adulterer, scourge ye each one of them (with) a hundred stripes...[7]

There is both a practical and a verbal Sunna of the Prophet in this matter. In the practical Sunna, he ordered the stoning of Māʿiz, Al-Ghāmidiyya and the two Jews. But in

his verbal sunna, he said:

> Follow my example, adopt the same course; God has laid down a way for them: a virgin with a virgin one hundred lashes and banishment for one year. A non-virgin with a non-virgin: one hundred lashes and stoning.

He also said:

> The blood of a Muslim man shall not be lawfully shed except for one of three reasons: infidelity after belief (i.e. apostasy), committing adultery after marriage, and killing a soul not for a soul.[8]

A Muḥṣin is a person who has married in full legality, whether a man or a woman, according to a proper contract. No consideration is given, with regard to his committing adultery, whether he was with his spouse, or divorced, sane, mature, free and Muslim.[9]

There is disagreement among the Fuqahā' with regard to Iḥsān. Al-Shāfiʿī and Mālik said that being a Muslim was not a condition of Iḥsān. Therefore, if a Muslim marries a Dhimmiyyah he becomes Muḥṣin. Ibn-Ḥanbal, however, does make Islam a condition, so that if a Muslim marries a Dhimmiyyah he is not Muḥṣan. It is related from Ibn ʿUmar that the Prophet said "A polytheist is not Muḥṣin"; and that freedom was not a condition for being Muḥṣin.[10] In the Shīʿī Madhhab Mutʿa marriage does not make a man Muḥṣan and if the wife of a man is not with him in the same town, he will not be considered as Muḥṣin.[11]

We have seen that in the Sharīʿa there are two penalties for adultery:

1. Lashing and banishment.
2. Stoning.

All madhāhib agree on these penalties but there is some difference in inflicting them on the accused person.

The penalty of lashing

The Sharīʿa punishes the adulterer who is not Muḥṣin with the penalty of lashing, which is legally determined as one hundred lashes; this is agreed upon by all ʿUlamāʾ because the relative Text is expressly stated. The Ḥanafiyya stipulate honest, well-reputed witnesses, who shall declare the occurrence of the adultery and who have to be confirmed by unimpeachable persons,[12] if the accused does not confess to the act. Al-Kulaynī said: the non-Muḥṣin is to be lashed one hundred lashes, as previously stated. Also an old man and old woman are to be lashed; the authority for this is that ʿAlī b. Abī Ṭālib ruled that an old man and old woman should be lashed one hundred lashes.[13]

The penalty of banishment

The Sharīʿa penalizes the adulterer who is not Muḥṣin with banishment for one year, after lashing. The authority for this penalty is the Ḥadith of the Prophet which says "A virgin (bikr) with a virgin (bikr), a hundred lashes and one year's banishment."[14]

This Ḥadith is not agreed upon among the Fuqahāʾ, therefore they disagree regarding the inflicting of this penalty.

Abū Ḥanīfa and his companions and al-Zaydiyya (Shīʿa) are of the opinion that this Ḥadith is abrogated or not

mashhūr and it hadith (Aḥad) personally, if they permit banishment they do so as a Taʿzīr, which can be imposed if the Imām sees fit. al-Zaydiyya concurs.[15]

Mālik considers banishment to be an obligatory Ḥadd for a man, but not for a woman;[16] al-Awzāʿī concurs. In the Mālikī Madhhab there is no banishment for a slave.

Al-Shāfiʿī and Ibn Ḥanbal are of the opinion that banishment is a Ḥadd to be inflicted on an adulterer who is not Muḥṣin;[16] al-Shāfiʿi says that banishment is for both men and women, whether they are free or slaves, while Ibn Ḥanbal says that banishment is a penalty for the free only, whether men or women.[17]

Jaʿfar al-Ṣādiq (Abū ʿAbdAllah) said, whoever concludes a marriage contract to marry a wife, but does not have sexual intercourse with her, and commits adultery, shall be lashed as stipulated in the Ḥadd - one hundred lashes - and shall be banished for one year.[18]

In the Jaʿfarī madhhab there is another penalty which goes with the penalty of banishment (lashing for the non-muḥṣin, as stated before), which is shaving the head and banishment from the town for one year; this also applies to the female adulterer if she is non-muḥṣina.[19]

On banishment, Nāfiʿ related from Ibn ʿUmar:

> The Prophet lashed, and banished, Abū Bakr lashed and banished, and ʿUmar lashed and banished. This is the real sunna of the Prophet.

The Ẓāhirī madhhab follows this. The following story is the authority:

A Bedouin came to the Prophet Muḥammad and said,

"O Prophet of God, give your judgement according to God's Book." He was accompanied by his opponent who was more religiously learned than him, and said, "Yes, pass judgement on us according to God's Book, and allow me to speak." The Prophet said, "Speak!" The man said, "My son was *ʿasīf* (employee) of this man, and he committed adultery with his wife. I was told that my son must be stoned, but I ransomed him with one hundred sheep and one with young. I then asked learned men, who told me that my son must be lashed a hundred lashes and be banished for one year, and that the wife of this man must be stoned." The Prophet said, "By him, in whose hand my soul is, I shall pass judgement between you according to God's Book. The sheep and the one with young must be returned to you; your son must be lashed a hundred lashes and be banished for one year. You, Unays, go tomorrow morning to the wife of this man, and if she confesses, stone her." Then Unays went to her on the following morning, and she confessed, so the Prophet ordered that she should be stoned.[20]

The distance for banishment, according to Ibn Ḥanbal and al-Shāfiʿī, is that distance at which the curtailment of the duration of prayers comes into effect.

The distance for the banishment of a woman shall be shorter than that distance in order that she be near her family, so that they may be able to take care of her; and it is probable that the banishment of a woman is not mandatory.[21]

With regard to the banishment of a man, Mālik said that he should be imprisoned in the town to which he is banished.[2] Al-Shāfiʿī said he should not be imprisoned in his exile.[23] Ibn Ḥanbal said there was no need for him to be imprisoned.[24]

The penalty of Stoning

Stoning is the penalty of the Muḥṣin adulterer, whether a man or a woman. Stoning means killing by throwing stones, which is agreed on by all ʿUlamāʾ; nothing is mentioned in the Qurʾān about stoning, but it is a practical and a verbal sunna of the Prophet, a penalty which he commanded, with the unanimous consent of the Companions, to be inflicted on Māʿiz al-Ghāmidiyya, and the mistress of the ʿasīf.

Those who rejected this sunna were a group of Khawārij, who denied the penalty of stoning for a Muḥṣin, but approved of lashing for both a Muḥṣin and a non-Muḥṣin, in accordance with the Qurʾānic text, "The adulterer and the adulteress: lash each of them one hundred lashes."

One group, however, of the Khawārij called al-Ibāḍiyya are said to have unanimously approved of the legality of stoning. In al-Musnad al-Ṣaḥīḥ, al-Imām al-Rabīʿ b. Ḥabīb al-Farāhīdī al-ʿUmānī relates from Abū ʿUbayda Jābir b. Zayd Ibn ʿAbbās, concerning ʿUmar's speech about the so-called disputation with the Prophet at the end of which is the narration of the proprietress of the ʿasīf, and the order of the Prophet to ʾUnays al-Aslamī to go to her and question her and if she confessed to stone her. She did confess, so he stoned her.

The Ibāḍīs still stone the Muḥṣin adulterer and adulteress. They assert that the Prophet ordered stoning, as did his Companions after him; this is confirmed by the sunna unanimously agreed upon. It is also confirmed by the verses in the Qurʾān,[25] because of the ḥadīth of ʿUmar b. al-Khaṭṭāb, who said:

> One verse that was revealed to the Prophet is the verse of stoning, and we read it and understand it: the Prophet stoned and we also stoned.[26]

The penalties of lashing and stoning are both to be inflicted on any adulterer or adulteress, but as previously stated, lashing only on non-Muḥṣin and stoning on a Muḥṣin. It is said that ʿAlī b. Abī Ṭālib both lashed and stoned when he was at al-Kūfa, that he lashed Shurāḥa al-Hamadaniyya on a Thursday and stoned her on the Friday. He said:

> He lashed her in accordance with God's Book, and stoned her in accordance with the sunna of the Prophet.[27]

There is a relation that Ibn Ḥanbal both lashed and stoned: first a hundred lashes, then stoning. Other sources, however, say that he did not lash once a sentence of stoning had been passed.[28] The penalty for adultery is of two kinds: the smaller Ḥadd which is lashing (as given in the Qur'ān), and the other, stoning, which is the greater Ḥadd. It is customary that the greater penalty supersedes the smaller.

Al-Kulaynī said:

> If a Muḥṣin man commits adultery he is to be stoned - not lashed.

On the authority of Imām Jaʿfar al-Ṣādiq Abū ʿAbd Allah he said:

> If a free man or woman commits adultery, each of them is to be lashed a hundred lashes, but stoning is to be inflicted on al-Muhsin and al-Muhsina. Whoever contracts a marriage but does not have intercourse with his wife, and

> then commits adultery, shall be lashed and banished for one year. Stoning is to be inflicted with small stones.[29]

The Prophet stoned but did not lash. It is said, however, that ʿAlī both stoned and lashed at al-Kūfa; this double punishment was denied by Abū ʿAbd Allah who said:

> We did not practice this, that is to say, two Ḥadds such as stoning and beating were not inflicted on a person for one offence by us.[30]

The authority for the unorthodoxy of both lashing and stoning is first the sunna of the Prophet, both practical and verbal, and secondly the speech of ʿUmar b. al-Khaṭṭāb, as related by Ibn ʿAbbās, as follows:

> ʿUmar said: 'I am afraid that after a long time people will say that they can find no reference to stoning in God's Book, and so they will go astray and neglect an obligation which God revealed. But stoning is to be inflicted if a man is Muḥṣin and the act is proved, or conception or confession takes place; and if an old man and old woman commit adultery, then stone them, without scruple. The Prophet stoned and we stoned. The Muḥṣin is not to be both lashed and stoned.[31]

The said Ḥadith is applied by all Madhāhibs, even the Ībāḍī.

Kāshif al-Ghiṭā' stated as follows:

> If a man commits adultery with any of his blood relations (who it is religiously forbidden for him to marry), or with any of those with whom he suckled or with the wife of his father, or if he forces a woman to commit adultery, the Ḥadd for him is death. The same applies if a Dhimmī commits adultery with a Muslim woman.[32]

There is one kind of adultery which is not penalized, though provisions are mentioned prohibiting it and that is looking on a person with lust; it has, however, no Ḥadd in the Sharīʿa nor in the Laws that preceded it, but it is left to the human being himself to discipline himself and keep himself from it.

A verse of the Qur'ān says:

> Tell the believing men to lower their gaze and protect their private parts from sins. That is purer for them...
>
> And tell the believing women to lower their gaze and protect their private parts from sins and not to show off their beauty except, only that which is apparent and to draw their veil over their necks and bosom and not to reveal their beauty except to their husbands...[33]

There is, furthermore, a Ḥadith of the Prophet on the subject, which concerns one's deportment on the highway. The Prophet said,

> Lowering one's eyes, desisting from injury and returning salutation...[34]

Looking at the forbidden degrees of consanguinity is like committing adultery, as is mentioned by the ancient ʿUlamā'.[35] However, no Ḥadd penalty is to be inflicted upon an offender because he has not harmed anyone else. The Laws prohibit a human being from looking at another with lust. Therefore it is the duty of both men and women to discipline themselves and to fear God in this affair. However. self-punishment is the severest penalty. Also Almighty God said,

> Allah knows the traitor of the eyes, and that which the bosoms conceal.[36]

Therefore a human being must discipline himself and restrain himself in all matters. A poet said:

> Men cannot be restrained from what entices them, if they do not restrain themselves.

Homosexuality is considered as equivalent to adultery and is punished with the same penalty according to the Sharīʿa; in certain cases a diminished penalty is imposed, and this depends on the Ijtihād of the Fuqahāʾ or ʿUlamāʾ.

Sodomy is intercourse between man and man. In the Mosaic Law both are to be killed because they have committed an abomination and there shall be no blood-revenge for them.

Leviticus, XX.

13. If a man also lie with mankind, as he lieth with a owman, both of them have committed an abomination: they shall surely be put to death; their blook shall be upon them.[37]

In the Sharīʿa there are many provisions from the Qurʾān about the people of Lut; Almighty God said:

> And Lut! (remember) when he said unto his folk: Will ye commit abomination such as no creature ever did before you?[38]

The text defined it as adultery. God prohibited adultery, saying:

> And unto Lut, ... and we saved him from the town (folk who) practised filthy (malicious)[39]

In our text it is also called a wickedness (khabītha) in that an act like this is interdicted intercourse.

For the Ḥanafīs (Abū Ḥanīfa and his two followers, Abū Yūsuf and Muḥammad Al-Shaybānī) a Sodomite is a criminal similar to an adulterer; he should be penalized by the Ḥadd of stoning if he is a Muḥṣin and by lashing if he is not a Muḥṣin, because the offence is of the same nature as adultery, i.e. the satisfying of lust with the object of lust.

Some Ḥanafī Fuqahā', such as al-Zaylaʿī, are of the opinion that if the Imām sees a public interest in killing a person who is habituated to sodomy he is then entitled to kill him.[40]

Al-Shāfiʿī says that the Ḥadd for adultery shall be inflicted on one who commits sodomy. There are two opinions in this matter: the first, which is mashhūr and is followed in the Shāfiʿī Madhhab, is:

> What is to be inflicted for adultery shall be inflicted for this (sodomy). If the offender is not a Muḥṣin, he shall be lashed and banished; but if he is a Muḥṣin, he shall be stoned.

The justification for this is Abū Mūsa al-Ashʿarī's relation from the Prophet:

> If a man has intercourse with a man, they are then adulterers...

The second opinion is that both the one who commits the act and the one upon whom it is committed shall be killed. This is based on Ibn ʿAbbās' relation from the Prophet:

> If you find any committing the act of the tribe of Lut, then kill both him who commits it and him upon whom it is committed.

There are two opinions with regard to the manner of the execution: one is that it should be by the sword, because this is the approved method of execution for ḥadd offences; the other is that it should be by stoning, because this is the accepted punishment for adultery, with which sodomy is equated.[41]

Ibn Ḥanbal is of the opinion that one who commits sodomy should be killed whether he is a Muḥṣin or not. He maintains further that he should be stoned in order that his punishment should be similar to that imposed by God on the tribe of Lūṭ.[42]

Female homosexual acts are punished by Taʿzīr, not by stoning, but the participants are regarded as being damned as adulteresses.[43] This is the doctrine of Ibn Ḥanbal, as well as of al-Shāfiʿī, and it is justified by the Ḥadith of the Prophet, "If a woman has intercourse with a woman, then both of them are adulteresses, and Taʿzīr shall be inflicted for it."[44]

The Jaʿfarī madhhab considers that sodomy and lesbianism are among the most serious offences, and that the ḥadd for them should be one of the most severe ḥudūd - "There is no more severe penalty than for this abomination. Burning is permitted only for this; otherwise it is completely excluded."[45]

The ḥadd for the sodomite may be inflicted in a number of ways, to be selected by the Ruler; these are: beheading, stoning, being thrown from a high place, or burning. The person sodomised is also to be killed if

he is mature and distinguished; but if he is young he is to receive Taʿzīr.

In cases of lesbianism, the committer of the act and the one upon whom it is committed are to be lashed a hundred lashes, and no consideration is to be given as to whether they are Muḥṣina or not.[46]

Al-Kulaynī said, concerning the ḥadd for lesbianism:

> Its ḥadd is that of adultery. So if two women are found under one cover, each shall be lashed a hundred lashes.

Abū ʿAbd Allah said:

> If two women are found under one cover with no partition between them, they shall be lashed according to the ḥadd; if this is repeated, the ḥadd of lashing shall again be inflicted on them; and if they do it a third time they shall be killed.[47]

A similar offence to sodomy or lesbianism is that of a man having intercourse with an animal. The Mosaic Law provides that whoever commits this act shall be killed together with the animal. If a woman approaches an animal ith desire, the woman and the animal shall both die; they are to be killed, and there shall be no blook revenge for them.

Leviticus, XX.

> 15. And if a man lie with a beast, he shall surely be put to death: and ye shall slay the beast.
>
> 16. And if a woman approach unto any beast: they shall surely be put to death; their blood shall be upon them.[48]

In the Sharīʿa, however, no ḥadd is to be inflicted on one who commits such an act, because it is not considered to be the equivalent of adultery, but only an

offence against proper behaviour and disgusting to human nature. The <u>Taʿzīr</u> is at the discretion of the authorities or the owner of the animal. Some are of the opinion that the animal must be killed or burnt, while others are not. Some distinguish as to whether it is an animal whose meat is edible, in which case some hold that it should be slaughtered and burnt; others hold that it should not be burnt. The former opinion is the more orthodox one. If it is not owned by the culprit he must pay its price to its owner before it is killed and burnt.[49] An act like this is forbidden by all sources. Al-Shāfiʿī is of the opinion that whoever has intercourse with an animal shall have the <u>ḥadd</u> for adultery inflicted on him. These are the general opinions in this regard:

1. The offender shall be killed, because of what Ibn-ʿAbbās related that the Prophet said: "Whoever has intercourse with an animal, kill him and kill it with him."[50] His death is to be like that inflicted for sodomy, i.e. either with a sword, or by stoning.
2. The offence is like adultery. If the offender is a <u>Muḥṣin</u> he shall be stoned, but if not, he shall be lashed and banished, since the <u>ḥadd</u> which is to be enforced for sodomy is exactly like that for adultery.
3. <u>Taʿzīr</u> is to be imposed. The <u>ḥadd</u> is mandatory for the restraining of the human soul from what it desires,

whereas the human soul does not desire an animal. As to the animal, some say that it must be killed and its price paid to its owner; while others say that it need not be killed. If it is an animal whose meat is edible, then it must be slaughtered, but if not, it need not be slaughtered, because the Prophet prohibited the killing of an animal whose meat was not edible[51]. Others say that the offender must be disciplined[52] only in a minor way.

In the Jaʿfarī madhhab, if a man has intercourse with an animal, they determined that the ḥadd should be twenty-five lashes, and that he should pay the price of the animal to its owner as a fine; the animal should then be killed and its meat burnt. If the animal is a riding animal, such as a donkey, then something less than the ḥadd is prescribed, and the animal must be taken away to another town and sold there[53].

How the ḥudūd are executed

In Mosaic Law, the ḥadd of lashing is to be executed on the convicted person in the following manner:

Stripes

How do they scourge him? They bind his two hands to a pillar on either side, and the minister of the synagogue lays hold on his garments - if they are torn they are torn, if they are utterly rent they are utterly rent - so that he bares his chest. A stone is set down behind him on which the minister of the synagogue stands with a strap of calf-hide in his hand, doubled and re-doubled, and two (other) straps that rise and fall (are fastened) thereto.

The handpiece of the strap is one handbreadth long and one handbreadth wide; and its end must reach to his navel. He gives him one-third of the stripes in front (on the chest) and two thirds behind (on that part of the shoulder that is bared), and he may not strike him when he is standing or when he is sitting, but only when he is bending low, (for it is written - The judge shall cause him to lie down -).[54]

The Sharīʿa stipulates that the ḥadd be executed in public, according to the Qurʾānic text:

> The woman and the man guilty of illegal intercourse - flog each of them a hundred stripes. Let no pity withhold you in their case, in matter prescribed by Allah, if you believe in Allah and the Last Day. And let a party of the believers witness their punishment.[55]

The al-Fuqahāʾ disagree as to the number of people who should be present; Mālik said "four persons or more"; others said: "three persons", others said: "seven or more";[56] al-Shāfiʿī said: "Four, because this is the number of witnesses required for conviction."[57]

The person on whom the ḥadd is inflicted is beaten while standing, according to all the Fuqahāʾ; in Ibn Rushd however, it is prescribed that he shall be beaten while sitting. He is not to be laid down on the ground, fettered or bound.[58]

His clothes shall be taken off except for what covers his genitals. This is because ʿAlī inflicted a ḥadd on a man and said to the executioner: "Beat him properly, giving each member of his body its due of strokes, but

protect his face and his genitals." In another account ʿAlī is alleged to have said,

> Distribute the beating on his body except for his head, his face and his genitals.

It is related of ʿUmar b. al-Khaṭṭāb that a slave girl who had committed adultery was brought before him, and he said:

> You two take her away and beat her, but do not break her skin; the object is to discourage her, not to kill her.[59]

Mālik said: "The beating shall be on the back, and the adjacent parts of the body." Al-Shāfiʿī said: "The beating is to be on all the members of the body, while the face, the head and the private parts are to be protected. The Ḥanafīs also protect the head, the face and the private parts. Abū Yūsuf said: "Beat the head also", but he abstained from it later.

ʿUmar b. al-Khaṭṭāb said to the beater: "When you beat, your armpit shall not be seen" - i.e. the beating should not be very severe - "and give every member of the body its due share".

The removal of the clothes produces more pain.[60]

A woman is to be beaten while seated, and her clothes are not taken off except for fur and padding. Her clothes are to be wrapped around her so that her private parts shall not be seen. She shall not be beaten on the head of the face.[61]

<u>Specification of the whip with which the maḥdūd is to be lashed</u>:

It should be neither hard nor soft, but in between,

and should have no knots. The justification for this is the Hadith of Muhammad b. ʿAjlān who related from Zayd b. Aslam, that the prophet was brought a man who had incurred the hadd. A new hard whip was brought, so he said: "softer than this"; they brought a soft whip, and he said: "harder than this"; so they brought a whip which was in between the two others, neither so suple as to cause great pain, nor so dry as to have no effect, and he said: "This one."[62]

A similar specification is given on the authority of ʿUmar b. al-Khaṭṭāb also, narrated by ʿĀṣim, from Abū ʿUthmān.

The hadd is not to be inflicted either in very cold weather or in very hot weather; this is agreed upon by the ʿUlamāʾ, since it is not meant to cause damage.

Stoning

In the Mosaic Law the hadd of stoning is to be executed on the convicted person as follows:

> (When the sentence (of stoning) has been passed they take him forth to stone him. The place of stoning was outside (far away from) the Court. One man stands at the door of the Court with a towel in his hand, and another mounted on a horse, far away from him (but near enough) to see him. If (in the Court) one said, "I have somewhat to argue in favour of his acquittal", that man waves the towel and the horse runs and stops him (that was going forth to be stoned). Even if he himself said, "I have somewhat to argue in favour of my acquittal", they must bring him back, be it four times or five, provided that there is ought of substance in his words. If then they found him innocent they set him free; otherwise he goes forth to be stoned. A herald goes out before him (calling) such-a-one, the son of such-a-one, is going forth to be stoned for that he committed such or such an offence. Such-a-one are witnesses against him. If any man knoweth ought in favour of his acquittal let him come and plead it?
>
> When he was about ten cubits from the place of stoning they used to say to him, "Make thy confession", for such is the way of them that have been condemned to

death to make confession, for everyone that makes his confession has a share in the world to come. For so have we found it with A chan.

When he was four cubits from the place of stoning they stripped off his clothes, a man is kept covered in front and a woman both in front and behind.

The place of stoning was twice the height of a man. One of the witnesses knocked him down on his back; if he turned face down the witness turned him on his back again. If he straightway died that sufficed; but if not, the second (witness) took the stone and dropped it on his heart. If he straightway died, that sufficed, but if not, he was stoned by all Israel.

All that have been stoned must be hanged. But the Sages say: None is hanged save the blasphemer and the idolator. A man is hanged with his face to the people and the woman with her face towards the fallows. S.R. Eliezer said. But the Sages say: A man is hanged but a woman is not hanged.)[63a]

In the Sharī'a Stoning is also executed while a man is standing, and no pit is to be dug for him. But in the case of a woman, a pit is to be dug for her, up to the navel. There is disagreement as to digging a pit for a woman. Ibn Nujaym said: "There is no harm in not digging a pit for her." The reason for this is that, if the ḥadd is as a result of a confession (whether it be a man's or a woman's), if the guilty party tries to escape once the stoning has begun, as Mā'iz did, the Prophet allows this, because it is not permissible to hold on to someone who is to be stoned as the result of a voluntary confession;[63] if, however, the ḥadd is the result of evidence,

the person is not allowed to try to escape, but must be stoned to death. In the Jaʿfarī Madhhab a woman who is to be killed by stoning must be buried up to her waist.[64]

If the stoning is as a result of the confession of the adulterer or adulteress, the person to start the stoning is the Imām but if it is as a result of evidence, the witnesses must begin it.[65]

In view of al-Shāfiʿī, no person may execute the ḥudūd on free men except the Imām, or whoever he authorizes to do so; according to the other madhāhib, there is no need for the Imām to be present at the execution of the ḥadd nor is he obliged to start the stoning. This is because there is no proof that the Prophet was present on such occasions.[65]

Executing an Adulterer

In the Mosaic Law, executing an adulterer (caught in the act) is lawful.[67] "If a man be found lying with a woman married to a husband then they shall both of them die."

In the Sharīʿa the killing of a non-Muḥṣin adulterer is unlawful, in the opinion of some ʿUlamā', except in the case of his being caught in the act.

However, in the opinion of Mālik, Abū Ḥanīfa and Ibn Ḥanbal, no qiṣāṣ is to be inflicted on the killer of a non-Muḥṣin adulterer; their justification for that is a judgement passed by ʿUmar in the case of a man who struck his wife's legs with a sword and cut the man

who was with her in two. So ʿUmar permitted the blood of the murdered person to be shed without retaliation, and considered that the killing expiated the sin.[68] Some ʿUlamāʾ justify killing an adulterer caught in the act in terms of the provocation caused if the woman concerned is the wife, mother or sister of the person who catches him; if she is not related there is no provocation. The majority of ʿUlamāʾ, however, do not consider any provocation as a justification for killing; they justify it as expiation of a muṅkar. This expiation they regard as a duty. This is the preponderant opinion in the three Madhāhib, i.e. the Mālikī, the Ḥanafī and the Ḥanbalī.[69]

Al-Shāfiʿī, however, considers that the non-Muḥṣin adulterer may not be killed, even when caught in the act, unless he cannot be prevented from committing the crime in any other way than by killing him immediately.[70] But some of his followers believe that he may be killed in any case.[71]

Mālik, Abū Ḥanifa and Ibn Ḥanbal consider that no qiṣāṣ or diya is to be imposed on the killer of a Muḥṣin adulterer, because killing him is justified as a result of his committing adultery. Since this is a Ḥadd and the ḥudūd may not be delayed or remited it is considered a duty to kill a Muḥṣin adulterer in order to expiate a sin, muṅkar.[72] The preponderant opinion in the Shāfiʿī Madhhab

is in opposition to this. It is that the killer of a Muhsin adulterer is to be killed, because he has killed for someone else, not for himself. This is countered by the argument that the blood of a Muhsin adulterer is permitted to anybody and not to one person only, and that killing him is a duty; this is different from the case of a murderer, whose blood is permitted only to the avenger who has the option either to kill or to pardon.

Infliction of the Hadd on the Sick

A sick person may be stoned, but may not be lashed until he has recovered. Stoning is intended to be fatal, so sickness is no reason for delaying it.[73] The justification for this is the hadith concerning Sa'd b. 'Ubāda reporting to the Prophet that a sick man had committed adultery. The Prophet said: "Beat him according to the hadd." Sa'd said: "O Messenger of God, the man is fatally ill; if we beat him one hundred lashes we will kill him." The Prophet said: "Take a bunch of dates, which is made up of one hundred twigs and beat him once with it",[74] which they did (i.e. they carried out the spirit of the punishment rather than its full force.) This representative punishment is adopted by all Islamic Madhāhib when the guilty party is mortally ill. So the hadd can be inflicted without danger of death.[75]

No hadd is to be inflicted on a pregnant woman

until she has given birth and has completed the number of days required for her purification. In the case of stoning, some Fuqahā' say that this should take place immediately after her confinement, but others say it should be delayed until her child needs her no more. The Ḥanafīs, however, hold that this delay should be so only if there is nobody else available to look after the child. It is related that the Prophet said to Al-Ghāmidiyya, after she gave birth: "Go back until your child will need you no more." The woman is left in freedom during this time if the adultery is proved by confession, but if it is proved by witnesses then she must be imprisoned until the time for the lashing or stoning is due.[76]

Conditions for the infliction of the ḥadd

That an adulterer be sane, of legal age, aware of the prohibitions, free and uncoerced, living in an Islamic country, having committed adultery with a woman he is prohibited from marrying without a marriage contract or suspicion. These conditions apply to both men and women and are agreed upon by all the Fuqahā'. To be lashed if he is not muḥṣin, and be stoned if he is muḥṣin.[77]

A minor or an insane person may not receive a ḥadd punishment, according to the Ḥadith of the Prophet:

> Three types of person are exempt from punishment: a minor until he reaches maturity, a sleeping person until he wakes up, and an insane person until he recovers.[78]

This is also agreed on by all Fuqahā'.

A *ḥadd* shall not be executed on a woman if she is coerced into committing adultery, according to the *Ḥadith* of the Prophet: "My people are not liable in the case of error, forgetfulness or coercion.[79]

Some *Shāfiʿī Fuqahāʾ* say that the *ḥadd* has to be inflicted on a man, because the illegal intercourse arises out of his own lust and is a voluntary action.[80]

Sexual Intercourse for which no ḥadd is to be inflicted

Adultery is sexual intercourse which takes place outside the bounds of a proper marriage or a *shubha* marriage. *Shubha* is something that appears to be legitimate but is not confirmed, so that an offender thinks that the act he is doing is proper and not prohibited.[81] In this case no *ḥadd* is inflicted, because of the *shubha* through which intercourse occurred.

The general principle in the *Sharīʿa* is that *ḥudūd* are abrogated by doubts. The basis for this principle is the saying of the Prophet: "Abrogate the *ḥudūd* if there are doubts."[82] It is related that ʿUmar b. Al-Khaṭṭāb said: "To make the *ḥudūd* inoperative by dint of doubts is preferable to me to inflicting them on doubtful grounds."[83] None of the *Fuqahāʾ* reject the principle of abrogating the *ḥudūd* by doubts except the Ẓāhirīs. They do not accept the relevant accounts of the Prophet and the Companions. Ibn Ḥazm states: "Some people are of the opinion that the *ḥudūd* are abrogated by doubts. Abū Ḥanīfa and his companions adhere most strongly to

this, then the Mālikīs, then the Shāfiʿīs. The Ẓāhiris however are of the opinion that the ḥudūd may not be abrogated by a doubt or executed on a suspicion because of the Ḥadith of the Prophet: "Your blood, property, honour and your skins are sacrosanct to you.[84] If the ḥadd is established it may not be abrogated, because of God's saying:

> ...These are the limits ordained by Allāh, so do not transgress them. And whoever transgresses the limits ordained by Allāh then such are wrong-doers.[85]

For their proof, they rely upon the saying that came down to us from the Prophet's companions, although it is not contained in any text or work by the Prophet.[86]

The Fuqahā' do not agree on what constitutes a doubt in the matter of abrogation. For example: A man who finds a woman in his bed and has sexual intercourse with her, thinking that she is his wife, is not liable to the ḥadd, according to Mālik, Al-Shāfiʿī and Ibn Ḥanbal.[87] They are of the opinion that the mere presence of the woman in the man's bed supports his claim that he thought her to be his wife, or his slave. Abū Ḥanīfa[88] however, disagrees, because any of the wife's blood relations or visitors may sleep on the wife's bed. In the opinion of Abu Ḥanīfa: "One who marries a woman incestuously is exempt from the ḥadd, because the ḥadd of adultery cannot be inflicted on him, as his marriage contract is invalid"; but Abū Yūsuf and Muḥammad[89] contradict Abū Ḥanīfa in this matter and hold to the

opinion of Mālik, Al-Shāfiʿī and Ibn Ḥanbal, which states that the ḥadd cannot be avoided because of the invalidity of the contract, as long as the offender is aware of the illegality of his marriage.[90]

Any marriage which is considered by all the Fuqahāʾ to be void, such as that with a fifth wife, or with a married woman, or one who is in her period of ʿIdda (the legally prescribed period of waiting during which a woman may not marry after being widowed or divorced) or one who has been divorced three times, does not, in Abū Ḥanīfa's view, incur the ḥadd, even if the offender is aware that it is prohibited; this is because (in the opinion of Abū Ḥanīfa) the contract constitutes a doubt sufficient to abrogate the ḥadd.[91]

Mālik, Shāfiʿī and Ibn Ḥanbal are not of the opinion that the ḥadd is abrogated in such cases, because they do not consider the contract to constitute a doubt.[92] Abū Ḥanīfa is further of the opinion that anyone who hires a woman and commits adultery with her should not incur the ḥadd because of the doubt constituted by the Contract. Abū Yūsuf and Muḥammad, however, disagree with him in this case, holding, with Mālik, al-Shāfiʿī and Ibn Ḥanbal[93], the opinion that the ḥadd may not be abrogated because of the doubt inherent in the contract, because it is a contract that does not make intercourse with the woman permissible. The justification of Abū Ḥanīfa is that this contract is a contract of benefit, and that the adulterer attains a benefit through adultery, so that the contract constitutes a doubt.[94]

Proof of Adultery

Adultery is proved by confession, by evidence of witnesses and by the appearance of pregnancy in unmarried women.

Confession has to be made four times, according to Abū Ḥanīfa and Ibn Ḥanbal and his followers. Mālik and al-Shāfiʿī say: "The confession by the adulterer once only is sufficient for the inflicting of the ḥadd.

Abū Ḥanīfa and his companions add that the confession shall be made on different occasions in accordance with what the Prophet did with Māʿiz - four times at separate sessions. Mālik and al-Shāfiʿī base themselves on what the Prophet did as regards the confession of Al- ʿAsīf which was made once only.[95]

Evidence

Adultery is proved by the evidence of four reliable witnesses: "Those who are chaste women and produce not four witnesses, flog them with eighty stripes."[96] The conditions of the evidence are: that it must be given orally, not in writing; that the witnesses should have witnessed the act in detail and that the place and time of the occurrence of intercourse must be specified. The Sharīʿa takes more trouble to establish this ḥadd than any other ḥudūd.[97] The evidence has to be given by four free and equitable Muslims on one single occassion, and they must say that they witnessed intercourse, (waṭ') but should not say that they witnessed adultery (zinā).

The appearance of pregnancy in unmarried women

If the intercourse took place through coercion, no ḥadd is to be inflicted, according to all the Fuqahā', provided that the woman proves the fact of coercion. No ḥadd is inflicted on an insane female. Some Fuqahā' consider that an insane man and a simpleton should incur the same ḥadd as a sane person - but only as the instigators of the deed. If the adulterer is in a war zone, and the woman a camp-follower, no ḥadd is to be inflicted on him. Again, if he is a minor or insane no ḥadd shall be inflicted on him. No ḥadd is to be inflicted for adultery after the elapse of a long time.[98]

In the Ja'farī madhhab, if a man rapes a woman he is to be killed whether he is Muḥṣin or not. He should be struck one blow with a sword whatever its result be on his body. If the woman agreed to intercourse she is also to be struck in the same way. The striking is done on the front or the back of the neck. If he or she does not die he or she is to be imprisoned until he or she dies.[99]

The ḥadd for slaves

> ... And when they have been taken in wedlock
> and if they commit illegal sexual intercourse,
> their punishment is half that for free women.[100]

Thus, if female slaves are Muḥṣina by reason of being concubines, or married to other salves, and they commit adultery, they shall receive half of the punishment which the Muḥṣināt receive. This is fifty lashes. Some

Fuqahā' said: "No ḥadd is to be inflicted on a slave girl, but she is to receive a Ta'zīr. The justification for this is that the Prophet, when asked about a slave girl who committed adultery when not muḥṣina, said: "If she commits adultery, lash her, and if she commits adultery again, sell her, even at a low price."[101] As for a male slave, the unanious consent of the fuqahā', that his ḥadd is half of that inflicted on a free person, is analogous with the ḥadd of a slave girl.

The male slave is not muḥṣin because he himself is not capable of entering into a proper marriage, which makes him liable to adultery.

The ḥadd of a slave in the Ẓāhirī madhhab is one hundred lashes.[102]

Inflicting the ḥadd on a slave

Some Fuqahā' say that the owner of a slave can inflict the ḥadd on him. Ibn 'Umar cut off the hand of a slave of his who stole, 'Ā'isha, Ḥafṣa and Fāṭima bint Muḥammad lashed female slaves of theirs who committed adultery. Ibn 'Umar said: "If the female slave has a husband, her case shall be referred to the Ruler, but if she has no husband, her Master shall lash her." Nobody contradicted him in this.[103] Some say the owner of a slave has no right to inflict the ḥadd on his own slave, because the inflicting of the ḥadd is in the hands of the Ruler, and no ḥadd is to be administered except on the basis of a confession or evidence from four equitable witnesses at one sitting.[104]

II. Qadhf (Defamation)

In the Sharīʿa Qadhf, Defamation, is accusing a muḥṣin married woman of adultery which is one of the abominable crimes in the unanimous agreement of all ʿUlamāʾ.[1] Almighty God said:

> Lo! as for those who traduce virtuous, believing women (who are) careless, cursed are they in the world and the Hereafter. Theirs will be an awful doom.[2]

The Prophet Muḥammad said:

> Avoid seven abominations: polytheism, witchcraft, killing a human being, taking usury, usurping the property of an orphan, retreating when the army is marching and defamation of female believers.[3]

If defamation is proved against a person who satisfies five conditions, the ḥadd of eighty lashes shall be inflicted on him. This is agreed by all the ʿUlamāʾ. A woman is treated like a man in this matter. The conditions are that he has to be sane, free, mature (of legal age), a Muslim and plain in uttering the expression used in defamation. The defamed person shall be mature, sane, a Muslim, free and virtuous.[4] Although defamation can be proved by the evidence of two equitable witnesses, or by the confession of the defamer himself that he has defamed the complainant and incurred the ḥadd[5] "according to the saying of God", it is to be proved by the evidence of four equitable witnesses.[6]

> And those who accuse honourable women but bring not four witnesses, scourge them (with) eighty stripes and never (afterward) accept their testimony - they indeed are evildoers.[7]

If the defamer is an owned slave, the ḥadd inflicted on him shall be forty lashes, which is half of the ḥadd inflicted on a free person. This is generally agreed by all the ʿUlamāʾ.

Ibn Ḥanbal and al-Shāfiʿī stipulate that the defamer should be of full age (i.e. mature). Mālik alone does not stipulate that the defamer should be a free person.[8]

The ḥadd is administered by means of beating the defamer with his clothes on, but if he is wearing clothes of fur, they shall be removed so that he feels the beating.

According to al-Shāfiʿī and Abū Ḥanīfa, no ḥadd is to be inflicted on one who defames his child or his grandchild, but according to Mālik, it is, because of the general application of the verse. For Ibn Ḥanbal, punishment for the defamation of a minor is obligatory and the one who defames his child has to bear the ḥadd unless his child pardons him.[9]

If one addresses a person as: "You blind one!" or "You one-eyed one!" or "You infidel!" he does not incur the ḥadd,[10] but he is to be rebuked for using insulting language. This is agreed by all ʿUlamāʾ.

If someone defames another by implication, e.g. if he says to him: "I am not an adulterer, and my mother is not an adulteress", this is considered to merit the ḥadd.

Also, if someone falsely attributes illegitimacy to another he incurs the ḥadd, in the view of Ibn Ḥanbal.[11]

III. Ridda (Apostasy)

The crime of apostasy does not exist in Mosaic law: there was no worship other than their own except image-worship. Moses, however, does warn the Israelites against following false prophets or one who worships another god. The penalty for such a defection was death by stoning.[1]

The Sharīʿa considers apostasy as a crime which affects Public order and is, therefore, to be punished by execution. An apostate is a Muslim who changes his religion, so apostasy is limited to Muslims.[2] It is said in the Qurʾān:

> ... And whosoever of you turn back from his religion and dies as an unbeliever then his deeds will be lost in this life and in the Hereafter, and they will be companions of the Fire. They will abide therein.[3]

The death penalty is prescribed, because of the saying of the Prophet: "Anyone who changes his religion, kill him."[4] There is disagreement on this. Some think that he should simply be made to repent. Others say he must be made to repent, and if he returns to Islam, he may live, otherwise he is to be killed. The basis for this is the saying of ʿAlī[5] and ʿUmar b. al-Khaṭṭāb[6] and all of the ʿUlamāʾ agree with them.

The execution of an apostate is to be carried out by the authorities, so if an individual kills him without permission from them, he has infringed their rights, and he is to be punished for this, but not for

the act of killing. The ʿUlamāʾ of all four Madhāhib[7] hold to this opinion, except for some Mālikīs,[8] who consider that the apostate is not protected, but that taʿzīr shall be inflicted on his killer, and the diya shall be paid to the Treasury.

The death penalty is also prescribed for apostasy in a woman, unless she repents.

All the Fuqahāʾ agree with this except Abū Ḥanīfa, who said: "She must not be killed, but is to be likened to her original state as an infidel." Ibn Ḥazm said: "The apostate shall either return to Islām, or shall be killed."[9]

In the view of Mālik and al-Shāfiʿī the property of an apostate is to be confiscated. The preponderant Ḥanbalī view is that all the property of an apostate is liable to confiscation, but some Ḥanbalī, and Abū Ḥanīfa, consider that only the property that he has acquired after apostasising is to be confiscated and that what he had acquired before belongs to his Muslim heirs. Ibn Ḥanbal also considers property acquired after apostasising shall not be confiscated, if the apostate has any heirs of the religion to which he has converted.[10]

IV. Al-Ḥarāba (Irreligious Militancy)

In the Qur'ān Almighty God said:

> The only reward of those who wage war against Allah and His Apostle and do mischief through the land is execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land. That is their disgrace in the world and great torment is theirs in the Hereafter.[2]

This verse was revealed concerning a group of Bedouins who came to the Prophet and declared that they would become Muslims. The climate of Al-Madina, however, did not suit them, so the Prophet sent them to a place outside, to reside with the shepherds of the Charity Camels. When they recovered their health, they killed the shepherd and drove the Charity Camels to their own home. When this news reached the Prophet he sent for them, and when they came, the Prophet ordered that their hands and feet be amputated (min-khilāf) (i.e. the right foot and the left hand). He then put out their eyes and left them until they died.[3]

This is the punishment of the muḥārib (the irreligious militant or aggressor) applied by Mālik, al-Awzāʿī, al-Laythī b. Saʿd, al-Shāfiʿī and Ibn Ḥanbal. Malik said: A person who waylays a man, making him enter a house by deceit, then killing him and taking what he has, is a muḥārib, and his blood shall be dealt with by the Ruler, not by a (personal) avenger of blood, and it shall make no difference if the latter remits his rights

to blood-vengeance. Abū Ḥanīfa and his followers said that ḥarāba is only considered so if committed in the desert; it is not considered so if committed in towns, because the victim can get help there.[4]

Ibn ʿAbbās said: "This verse was revealed about Muslim highway robbers." This is agreed by Mālik, al-Shāfiʿī, Abū Thawr, and Abū Ḥanīfa and his followers.

Ibn ʿUmar is quoted as having said:

> This verse was revealed in respect of Apostates, and the occasion for its revelation is the episode of those who killed the shepherd and took the charity camels after they had converted."

From Abū Dāwūd : "Ḥarāba is one of the ḥudūd crimes, and its penalty is a prescribed ḥadd. The penalty of a ḥadd is obligatory, so it is not remitted by virtue of negligence in executing it or of pardon for it."

A Muḥārib is a person who commits the crime of ḥarāba which is highway robbery, mostly outside towns; some call it "Great Robbery".[6] He must satisfy three conditions:

1. That he shall have committed the act in the desert - i.e. outside of a town; therefore if he commits theft inside a village or a town he is not considered a muḥārib but a mukhtalis, who is not a highway robber. This is the opinion of Abū Ḥanīfa, al-Thawrī and Isḥāq, and Ibn Ḥanbal agreed with this. Al-Awzāʿi, al-Laythī, al-Shāfiʿī, Abū Yūsuf and Abū Thawr said that one who committed this act in villages and towns was also a muḥārib,

because of the general application of the verse; such a one was more harmful and frightening inside a town.[7]

2. That he shall have been carrying arms. Al-Shāfiʿī and Abū Thawr, however, consider such a person a muḥārib even if he does not carry arms, because he may attack travellers with a stick or a stone. Abū Ḥanifa says that he is not a muḥārib unless he carries arms.

3. That he shall have come openly and taken property by force. If he takes property while disguised, he is considered a thief (sāriq). If he steals and runs away (without using force.), he is considered a robber (muntahib), and he shall not incur the penalty of amputation.[8]

The Penalty

Both the right of God and the rights of human beings are to be claimed from the muḥārib. It is unanimously agreed that the right of God is death, crucifixion, the amputation of the hand and the foot (min-khilāf) and banishment. These penalties are prescribed according to the seriousness of the crime committed by the muḥārib.

Mālik said that he must be killed and that the Imām has no discretion in substituting amputation or banishment.

Abū Ḥanīfa, al-Shāfiʿī, Ibn Ḥanbal and a group of ʿUlamāʾ said that the penalty to be imposed should depend on the actual acts of the muḥārib. A killer is to be

killed; one who takes property is to suffer amputation. Banishment is permitted only for one who has neither killed nor taken property, but has merely frightened a caravan. Others consider that the Imām has absolute discretion, whether the muḥārib has killed or not, and whether he has taken property or not. The reason for this disagreement is the word aw, 'or', in the verse, and dispute as to whether it was intended to permit choice or a (fixed) gradation, depending on the seriousness of the crime. Mālik treated some muḥāribs on the basis of gradation and others on the basis of the provision for choice.

As regards a banished person, in the Shīʿī madhhab a written communication is to be sent to the people of the town to which he is banished, instructing them not to eat with him, sit with him or deal with him for one year.[9]

In the view of Al-Shāfiʿī, if anyone threatens people with arms and causes terror on the highway, either in a town or in the desert, it is the Imām's obligation to seek him out, because if he is left free, his influence increases, and the ill effects of this spread; if he is arrested before he takes property and before he kills, he is to be reproved or imprisoned, according as the Ruler sees fit. His justification for this is a statement by Ibn ʿAbbās, who said regarding highway robbers: "If they kill and take property, they shall be

killed by crucifixion; and if they take property but do not kill, their hands and feet shall be amputated min-khilāf, and they shall be banished to another town. It is also said that they shall be imprisoned until they repent or until they die. If they kill but do not take any property, their execution shall be mandatory, and the blood-avenger shall not be allowed to pardon them.

As to the matter of killing and crucifixion, some Shāfiʿite Fuqahāʾ said that one who kills and takes property shall be crucified alive. Al-Shāfiʿī said: "He shall be crucified for three days before execution." Others said: "He shall be executed and then crucified for three days, if the weather is moderate; otherwise he shall be bathed, shrouded and prayed over before the three days are complete."[10]

Crucifixion here means that he shall be bound to a piece of wood until the pus and fat run out of his body, and no food or drink shall be given to him.[11]

The ḥadd is established against a muḥārib by his confession or by the evidence of witnesses. Mālik accepts the evidence of robbed persons against those who have robbed them. Al-Shāfiʿī accepts the evidence of the victims' companions provided that they have not taken property.[12]

If a woman is proved to be a muḥāriba, she is to be treated in the same way as a man. This is the

statement of Al-Shāfiʿī, and the Ḥanbalīs agree with it,[13] Abū Ḥanīfa, however, said: "No *ḥadd* shall be inflicted on her, because she is to be considered like a child or an insane person."

The penalty for a *muḥārib* is remitted if he repents before he is arrested. Almighty God said: "Except those who repent before you take hold of them."[14] All *ʿUlamāʾ* accept this. But if he repents only after he is arrested, the obligatory *ḥadd* shall be inflicted on him.[15]

V. Sariqa (Theft)

The penalty for theft is contained in various texts of the Mosaic Law, and its penalty is Herem (interdiction), and amputation.

In the Qur'ān God said:[1]

> The thief, male or female, cut off his or her hand as a recompense for that which they committed, a punishment by way of example from Allāh...[2]

The Sharī'a defines Theft as follows:

> Theft is the taking of the property of someone else secretly from a Ḥirz (secure place), without its being entrusted to him, when he takes it from the said Ḥirz.[3]

The stolen thing must be property. So, if a free human being is stolen, he is not considered to be property because he cannot be bought or sold. But if he is a slave, he is considered as property which can be bought and sold. This is the opinion of the Ḥanbalīs. In the view of the Mālikīs, a free young person is similar to a slave, so he is property.[4]

Amputation of the right hand for the first offence is the penalty for Theft, unanimously agreed by all 'Ulamā'. There is disagreement only about the ḥirz from which the stolen object is taken. All savants agree that for the penalty of amputation to apply, the stolen property must have been taken from a ḥirz. This is the basis on which judgement is given. A ḥirz is a place where property is kept, such that it is very difficult to remove it. For example, there is a locked padlock on a place which contains property; if a thief breaks such

a lock and takes the money he is considered as having taken it from a ḥirz, and he incurs the penalty of amputation.[5] This is the view of Mālik, Abū Ḥanifa, al-Shāfiʿī, al-Thawrī and their followers. For the Ḥanbalīs, stealing from a house, whether it is open or closed, entails the inflicting of the ḥadd of amputation, since it is considered as a ḥirz. The Ḥanbalīs also consider that property which is kept in a shop is 'secure' in this way, if the owner of the shop is present.

Other schools define ḥirz further. Mālik said: "A ḥirz is anything in which it is customary to keep the stolen thing", for example, a stable is a ḥirz for animals. Furthermore a human being is a ḥirz for anything he is wearing or has on his person. Similarly, if a sleeping person rests his head on something, for example, if he rolls up his cloak for a pillow, he constitutes a ḥirz for it.[6]

A closed door in a house makes it a ḥirz for property, in the opinion of all fuqahā'. They differ, however, in their further definitions of what constitutes a ḥirz. For example, Mālik considers a jointly-used residence as a ḥirz for what it contains. They have different opinions as to the person who robs graves by digging them up and taking what they contain; Mālik, al-Shāfi'ī and Ibn Ḥanbal consider a grave to be a ḥirz, while Abū Ḥanīfa does not.

According to Mālik, one who steals jewellery or anything else which an infant (ṣabī or ṭifl) is wearing, shall not suffer amputation, if the infant has no-one

looking after him. One who steals from a mosque or one who steals from the Kaʿba shall not be regarded as a thief on whom amputation is to be inflicted, according to all the ʿUlamāʾ except Mālik.[7]

According to the Ḥanafīs, one who steals something in a house but does not take it out of that house shall not receive the ḥadd of amputation. But once he takes the stolen thing out of the house and puts it on an animal, he becomes liable to this. One who steals from a Mosque during the day shall not suffer amputation, but if he steals at night he shall. In Abū Ḥanīfa's view, one who steals a robe from beneath a man in a public bath incurs amputation; his followers, however, do not agree to amputation but that the fatwā should follow. In the opinion of Zufar and others of Abū Ḥanīfa's followers, one who takes property that is wrapped up and held in someone's hand, or one who steals from a caravan or from the back of an animal shall not suffer amputation, but in the opinion of Abū Yūsuf (Ḥanafī) he shall suffer amputation, if the niṣāb is satisfied.[8] In some Madhhabs, the definition of a ḥirz varies according to the type of property kept in it.

Abū Ḥanīfa considers all types of ḥirz as being on the same footing, regardless of the type of property. For al-Shāfiʿī, on the other hand, what is to be considered as a ḥirz differs according to what is kept there, so that for things of little value such as wood and coal a lightly secured place may be so considered, while for things of great value, such as silver and gold,[9] the place must be heavily secured.

According to all the ʿUlamāʾ except the Mālikīs, if a thief enters a closed house or shop and steals, but cannot take the things out, and is arrested while he is inside, no amputation shall be inflicted. But if he takes the things out, then amputation shall be inflicted. In the opinion of the Mālikīs, however, amputation applies even in the former case, because he is about to leave the ḥirz, having violated it and entered it.[10]

If two persons collaborate in a theft, and one of them enters the house and collects the things that he wishes to steal and to hand over to his accomplice who is waiting outside, and both are arrested before the property has left the ḥirz, no amputation is to be inflicted on them.

In the opinion of Abū Yūsuf, if the accomplice who is outside puts his hand through the window or the door in order to take the stolen articles from the one who is inside, amputation is to be inflicted on both of them, since both of them have violated the ḥirz.[11] However, if the person who is inside puts his hand out and hands over the stolen articles to his partner who is outside, amputation shall be inflicted only on the person who is inside.[12]

In the opinion of Al-Shāfiʿī, if two persons dig up a ḥirz and steal property to the value of twice the Niṣāb amputation is to be inflicted on both of them. If, however, one of them takes Niṣābayn, while the other takes nothing, amputation shall be inflicted on the one who has taken the property and not on the other. If they

share in the theft of property amounting to one *Niṣāb*, amputation shall be inflicted on neither of them, except in the view of one Shāfiʿī *faqīh*, who said that it should be inflicted on both of them.[13]

That which is stolen must be property (*māl*); and what is permitted to all such as game, wood or grass, is not regarded as *māl*. Even in these cases, however, there is disagreement. Al-Shāfiʿī considers these as property if someone takes them from someone else. For example, if someone catches a bird and someone else takes it from him, the latter is considered a thief and incurs the *ḥadd*, if its value amounts to the *Niṣāb*, because this is then a *māl* prohibited to the person who takes it. In the opinion of Abū Ḥanīfa, however, he does not incur amputation, because it was originally permitted to everybody. Abū Ḥanīfa said that a person who stole a Qurʾān should not suffer amputation, but Mālik considered that he should. Al-Shāfiʿī also said that anyone who stole a mosque lantern or a curtain from the Kaʿba should suffer amputation, but Abū Ḥanīfa said that he should not. According to Al-Shāfiʿī, if a young slave or someone who does not understand the language steals, he shall suffer amputation, but according to the Ḥanafīs he shall not.[14]

Apparently the basis upon which some jurisprudents do not impose this punishment for the theft of certain articles is that they have not been sold, or that everybody is entitled to them, such as birds (i.e. game) because they are permitted to everybody in principle. So, if anyone takes a bird which someone else has caught, in

the opinion of the Ḥanafīs he shall not suffer amputation because the hunter did not pay for it a price which is equivalent to the Niṣāb.

Theft between spouses entails no amputation, according to Mālik, if they are living in one house, but if they are separated it does. According to the Ḥanafīs no amputation is entailed in either case, and according to Al-Shāfiʿī, too, no amputation is entailed.

According to the Shāfiʿīs, no amputation shall be inflicted on a wife who steals the property of her husband, because she has a right to his property, and he must pay her living expenses. But a husband who steals from his wife shall suffer amputation, because he has no right to her property. Furthermore, if a slave steals from his master or his mistress, he shall not suffer amputation because he is entitled to his living expenses and also because he is part of their property. If, however, a master or a mistress steal the property of their slaves, the ḥadd shall be inflicted on them for this.[15] According to Mālik, one who steals from his father incurs no amputation; this is the view also of the Shāfiʿīs and the Ḥanbalīs.[16] With regard to full blood relatives, such as brothers and sisters, Al-Shāfiʿī said that amputation applies, as did Mālik; but for the Ḥanafīs amputation does not apply, because they are of the prohibited relationship by blood, and not through a foster mother. According to the Ḥanbalīs, this relationship prevents their evidence as witnesses being accepted, but does not preclude amputation.[17]

If a guest steals the property of his host from a hirz, the hadd shall be inflicted on him if the hirz is the place in which he actually was. Some say that the hadd is to be inflicted on him if the host admits that it was his guest who stole from him, but if he does not admit this, no hadd shall be inflicted on him. In Ibn Hanbal's view, no amputation shall be inflicted on him because his host has given him a free hand over his property and his house, and so he is to be considered as his son.[18]

As regards money for business speculation, if it has been entrusted to the speculator (mudārib) and a stranger steals it, the hadd shall be inflicted on the speculator, according to all ʿUlamāʾ. And if the broker steals or takes unlawful possession of money owned by someone else, and a thief steals it, in Mālik's opinion, the speculator is liable to the hadd, because the money was secured. The Hanafīs consider, however, that he is to be treated like a ghāsib that is to say that he shall not suffer amputation. In the view of the Hanbalīs also no amputation is to be inflicted on him, because he has not stolen the money from its owner or from someone who stands in the place of the owner; this money is regarded as 'lost property'.[19]

There shall be no amputation in the case of an embezzler because of the saying of the Prophet: "No amputation shall be inflicted on an abuser of the office or trustee or on an embezzler."[20] Another Hadīth states:

"No amputation is to be inflicted on a Muntahib, but anyone who commits a nahbah mashhūrah shall not be considered as one of us."[21] This is because the muntahib or the mughtaṣib/ghāṣib takes the money in such a way that it can be recovered from them by appealing for help to the people or through the Government; there is, therefore, no need for inflicting amputation[22] in order to restrain them; also their theft is not in the ḥirz category. This principle was, however, disregarded by Iyās b. Muʿawiya, who inflicted amputation for ightiṣāb.

ʿĀriya/ʿAwārī (loans)

Anyone who borrows something but afterwards denies the fact, shall receive the ḥadd. The precedent for this is the well-known story of the Makhzūmī woman who used to borrow jewelry, and the Prophet ordered that the ḥadd be inflicted on her, which Ibn Ḥanbal agreed with.[23] The story is as follows: A Makhzūmī woman used to borrow articles and then deny having done so; the Prophet ordered that her hand be amputated according to the ordinances of the ḥadd. Usāma went to her family and they talked to him, then Usāma talked to the Prophet, who said to him: "Usāma, I do not think you are talking about one of God's Ḥudūd." Then the Prophet stood up and delivered this speech:

> Those who lived before you were destroyed, because if a noble man among them stole something they used to let him go, but if a weak person among them stole something, they used to punish him with amputation.[24] I swear by Him in whose hands my soul is, if it should be Fāṭima Bint Muhammad, I shall punish her with amputation.[25]

There is disagreement over accepting this Ḥadīth, for it seems that there is something omitted from it, which is that she had stolen when she denied the borrowing, which is proved by the saying of the Prophet:

> Those who had lived before you were corrupt, because if one of their noblemen stole, they used to free him, unpunished.

This Ḥadīth was told to al-Layth b. Saʿd by al-Zuhrī and supported by him, for he said:

> The Makhzūmī woman stole and denied the theft: the reason for the amputation is the theft and not the denial, because a borrowed article is not considered to be 'secure': it was not taken without the permission of its owner, or from a ḥirz, but was borrowed from the person of its owner and therefore no amputation is to be inflicted for it, according to the majority of the Fuqahāʾ.[26]

A borrowed article serves the interests of the borrower; borrowing is a common human condition, and it is meritorious to lend something when someone is in need.

Al-Niṣāb

If we look at the text:

> As for the thief, both male and female, cut off their hands. It is the reward of their own deeds, an exemplary punishment from Allāh is Mighty, Wise.[27]

revealed concerning the ḥadd for theft, we see that it is a general one and does not determine for the theft a Niṣāb which requires the inflicting of the ḥadd. Some rejected this opinion, for example, the Ẓāhiriyya and a group of the Khawārij. The Ibāḍīyya, too, do not apply the Niṣāb, which is adopted by the five principal Madhāhib.[28] Their justification is the above-mentioned text, and the Ḥadīth of the Prophet which states:

"God curse the thief who steals a helmet; his hand is to be amputated. So if anyone steals a rope, his hand is to be amputated."[29] (The helmet here is an iron helmet, and the rope is a ship's rope.) This implies a gradual development in theft, starting with something small and proceeding to something big, for which the hand shall be amputated. It is implied that amputation was practised during the Jāhiliyya, as well, without a Niṣāb, but they used to distinguish a noble person from others. A noble person was protected, while a commoner suffered amputation.

It is narrated on the authority of Ibn ʿUmar that the Prophet imposed amputation for the theft of a shield (mijann) whose value was three dirhams of silver. The force of this ḥadīth is emphasised by the action of the Caliph ʿUthmān, when he caused someone to be punished by amputation for the theft of an "Utrūja" estimated to cost three dirhams; Mālik said: "This is the best thing I ever heard about this affair." Al-Shāfiʿī cites the precedent, from ʿĀʾisha, that the Prophet imposed amputation for something whose value was a quarter of a Dinar of gold. Therefore Mālik evaluates the stolen article in Dirhams and Al-Shāfiʿī in Dinars.

Ibn Ḥanbal together with Isḥāq and Ibn Rāhawayh are of the opinion that anything the value of which is equal to quarter of a Dinar or three Dirhams shall entail amputation, in accordance with the ḥadīth of Ibn ʿUmar and ʿĀʾisha; and all the fuqahāʾ agree that amputation shall not be inflicted for something of lesser value.[30]

As to the Fuqahā' of Iraq, Abū Ḥanīfa and his followers, and Sufyān al-Thawrī, they inflict amputation for any stolen thing the value of which is ten dirhams; this for them is niṣāb for inflicting the ḥadd of Theft, provided that the dirhams are genuine and not counterfeit, and they maintain that the value of the mijann in question was ten, not three, dirhams. For them this is a precautionary measure, that is, agreement on, and application of, the maximum Niṣāb, because the ḥudūd are made void if there is a doubt. There was disagreement, however, about the niṣāb; Ibn Abī Laylā and Ibn Shibrama said: "A hand shall not be amputated for what is of less value than five dirhams", and others set the minimum at two dirhams.[31]

In the Jaʿfarī madhhab, amputation is to be inflicted for a stolen thing the value of which is a quarter of a dinar of pure gold.[32] Among the Khawārij, the Ibāḍiyya first take into account the question of ḥirz; if the secured article's value is at least four dirhams, amputation is to be inflicted.[33]

The Fuqahā' of Iraq also base their views on the value of the mijann, Some of them said that its value was ten dirhams; others agreed with Ibn ʿUmar that the Niṣāb was three dirhams - this was because the preponderant opinion was that the value of the dinar at the time was twelve dirhams, and that therefore a quarter of it was three dirhams.[34]

The ḥadd for Amputation

Anyone who steals something of the value of the Niṣāb, being mature, sane and able to distinguish right from wrong,

from a ḥirz which he knows not to belong to him, shall suffer amputation.[35] The sustaining principle is to be found in the Qur'ān.[36]

This is agreed to unanimously by all fuqahā'. Amputation is to be inflicted if:

1. The property stolen is taken secretly or by means of disguise.
2. The value of the property amounts to the niṣāb. (Some fuqahā' do not take the niṣāb into consideration.)
3. The stolen property must be able to be offered for sale - i.e. of a certain value.
4. The property is stolen from a ḥirz. (Some Fuqahā' are of the opinion that the ḥirz is the most important thing.)
5. The thief brings the stolen article out of the ḥirz, i.e. it has to be in his hand when he is caught.

The ḥadd of amputation is to be established either by confession or by evidence.

Confession:

The thief must admit that he himself has committed the theft. The number of times that confession must be made is not determined. Some Ḥanafīs say that amputation is to be inflicted if he confesses once; others say that amputation shall not be inflicted until he has confessed twice, at two different sessions;[37] they assert that this rule derives from ʿAlī. It is narrated that a man came to ʿAlī and confessed to a theft, but ʿAlī postponed his case to another session. (Another version is that he

kept silent and did not reply.) The man returned and confessed again, whereupon ʿAlī said to him: "You have given evidence against yourself twice." Then he issued his order and the man suffered amputation. He said: "You have confessed your guilt twice."[38]

The Ḥanbalīs adopted the rule of requiring confession three or four times; their justification is the following <u>ḥadīth</u>: Abū Dāwūd related, on the authority of Abū Umayya Al-Makhzūmī, that the Prophet summoned a thief who had confessed, and said to him: "I do not think you stole." The man said, "Yes". The Prophet repeated his statement twice and thrice and then ordered that he should suffer amputation. If amputation was to be imposed after the first confession, he would not have delayed it.

In the thief's confession, he must state how the theft occurred and whether it took place from a <u>ḥirz</u> or not.[39] Such repeated confession is generally considered obligatory in the case of a <u>ḥadd</u> such as this, which causes physical damage, just as it is in the case of the <u>ḥadd</u> for adultery. ʿAṭāʾ and al-Thawrī, Abū Ḥanīfa, Al-Shāfiʿī and the Ḥanafī Muḥammad b. al-Ḥassan require only one confession, regarding this as adequate proof of the truth, and considering repetition of the confession as unnecessary. Ibn Abī Laylā, Abū Yūsuf, Ibn Shibrima, Zufar, the Ḥanbalīs and the Mālikīs, however, think that the confession should be made two or more times.

Evidence must be given by two equitable witnesses, who must agree with each other, and not differ as to the place, the time and the person. The name of the person who

has been robbed must be stated, and whether or not the property was in a ḥirz.[40]

If the two witnesses give different versions of the place, the time or the stolen article, for example, if one of them gives evidence that the person stole on a Thursday, while the other says that he stole on a Friday, or if one of them says that the stolen thing was an ox, while the other says that it was a cow, the accused shall not suffer amputation for the theft, because of the different statements of the witnesses. This was agreed by Al-Shāfiʿī, Abū Thawr and the Ḥanafīs.

Some ʿUlamāʾ say that the decisive evidence shall be about the act only, even if the witnesses are in disagreement as to the place, the time, the stolen thing, or the party from whom it was stolen; the evidence will then be accepted. Their justification for this is that no text, Sunna or Ijmāʿ is quoted on the necessity for agreement on these other points. What is decisive is the statement of the witnesses that so-and-so has stolen. The Qurʾān did not specify that the thief, for example, should have stolen a cow or a quantity of gold; it merely required that he should have stolen: "And for the thief, both male and female, cut off their hands..." Thus a statement of the time, the place and the nature of the stolen thing is something extra, which is irrelevant. The important point for them is that the number of witnesses should be four.[41]

The method of amputation

"The male thief and the female thief, cut off the hands of the two of them." Fuqahā' are agreed that the phrase "the hands of the two of them" include the feet as well. The limb which is first to be amputated, once the conditions of the ḥadd are met, is the right hand. Most fuqahā' agree that the right hand shall be amputated from the wrist, and that this is the general practice;[42] others, however, say that the fingers only are to be amputated.[43]

The practice followed by the Shīʿites is that the four fingers of the right hand are to be amputated (the thumb is to be excluded). If the thief commits theft a second time, his left foot shall be amputated from the middle of the foot; and if he does so a third time he shall be imprisoned for life and the cost of his maintenance shall be borne by the Muslim Treasury (Bayt al-māl). This is based on ʿAlī's statement that this was the practice of the Prophet.[44]

Ibn Rushd says, as does Al-Māwardī, that the hand is to be amputated from the kūʿ, while the majority of jurisprudents say that it is to be amputated from the rusgh. Some Shāfiʿī references specify[45] that the hand is to be amputated from the mifṣal al-kaff. All of these terms apparently refer to the wrist. Abū Bakr and ʿUmar are related to have said:

> If a thief steals, amputate his right hand from the kuʿ, because seizure is carried out by the palm; anything in excess of the forearm is supplementary, and the Diya shall be paid for it.

The kuʿ is the bone which is located next to the thumb starting from the rusgh.[46]

As we have seen, when the crime of theft is proved, the hand is to be amputated, but if the hand is not amputated for some reason, for example, that the person robbed does not find the stolen article on the thief, the thief shall be fined. Here there is disagreement between the fuqahā', for some of them, Al-Shāfiʿī, Ibn Ḥanbal, al-Laythī and Abū Thawr, say that he is to be fined as well as suffering amputation, while some, Abū Ḥanīfa, Al-Thawrī, Ibn Abī Laylā and others say that after amputation he shall not be fined.

Mālik and his followers say that if a thief is well-off, he shall afterwards be made to pay the value of the article stolen, but if he is not well-off he shall not afterwards be made to pay for it, even if he becomes rich. Mālik stipulates that the state of prosperity shall have continued until the day of the amputation.

The justification of the group who say that he is to be fined as well as suffering amputation is that theft involves two rights: the right of God (which involves amputation) and the right of the human being (which involves the fine); it is thus necessary that each must exact his right. If the stolen property is found, the owner shall take it back, but if it, or its equivalent, is not found on the thief, he shall be made a surety for it, as if the practice with regard to all property.[47]

Among Iraqi fuqahā', the Kūfans rely on the tradition of ʿAbd al-Raḥmān b. ʿAwf : "The prophet said: 'A thief

shall not be fined if the hadd has been inflicted on him."[48] Some of them do not accept this hadith because it is "broken" according to Abu ʿUmar Ibn ʿAbd al-Birr; but others say that it is "continuous" and comes from al-Nassa i.

The opinion of these Kufan authorities is that making two rights out of one right is contradictory to principle, and they say that amputation is in the place of a fine. They have a further opinion, which is that if a thief steals something and suffers amputation for this, he shall not suffer amputation for a second theft.

The opinion of Malik, which is mentioned above, is an istihsan which is not based on Qiyas.[49]

A thief's hand shall be amputated on the first occasion on which the conditions for the hadd are established in his case - provided that, if he has committed theft on a number of previous occasions but has not been arrested and brought to trial, these shall not be taken into account when punishment is inflicted on him. /For example: It is related by Ibn Wahb on the authority of Sufyan Al-Thawri, on the authority of Hamid Al-Tawil, who quotes Anas b. Malik, who said that a thief was brought before ʿUmar b. al-Khattab and said: "I swear by God that I did not steal." ʿUmar said to him: "You lie. I swear by the God of ʿUmar that God does not penalize a slave (a human being) for his first sin." Then ʿUmar issued his order and the man suffered amputation. After that ʿAli b. Abi Talib came up to him and said to him: "By God, how many times did you steal?" He said: "Twenty-one times."/[50]

If a thief steals again, after the amputation of his right hand, his left foot shall be amputated; if he steals a third time, his left hand shall be amputated; and for the fourth time his right foot shall be amputated. As to the amputation of the foot, there is some disagreement. Some of them say that it shall be amputated from the joint of the leg, i.e. the entire foot, while others say that the toes of the foot only or half of the foot shall be amputated. There is a hadīth of ʿAmr b. Dīnār or ʿUmar b. Yasār, on the authority of ʿIkrima, that ʿUmar b. Al-Khaṭṭāb amputated the hand from the rusgh and the foot from the instep. The Ḥanbalīs say that the foot is to be amputated from the joint of the ankle. In the opinion of the ʿUlamāʾ the amputated hand shall be hung from the thief's neck for one hour.[51]

There is also disagreement as to the number of times that amputation may be inflicted. It is related of Abū Bakr and ʿUmar that they amputated one hand and one foot. This is the principle adopted by Qutāda, Mālik, Al-Shāfiʿī, Abū Thawr and Al-Mundhir, i.e. the amputation of one hand, and of one foot only, for a second offence. ʿUthmān, ʿAmr b. Al ʿĀṣ and ʿUmar b. ʿAbd al-ʿAzīz, however, said that first the right hand was to be amputated, secondly the left foot, thirdly the left hand, and fourthly the right foot; on the fifth occasion the thief was to be executed. ʿAlī b. Abī Ṭālib's view was that on the third occasion the thief was to be imprisoned. The justification of the first group was that this was what Abū Bakr and ʿUmar did, and that the Prophet had said:

"Follow those who come after me, Abū Bakr and ʿUmar."

The justification of the second group, those who amputate the four members, hand - foot - hand - foot, was that this was what the Prophet had done; it was related on the authority of Abū Hurayra that the Prophet said about a thief: "If he steals, then amputate his hand, then if he steals thereafter amputate his foot; if he then steals amputate his hand, and if he steals afterwards amputate his foot."

In the doctrine of the Ḥanbalīs, the hand of a thief is to be amputated for the first _ḥadd_ and if he commits theft again his foot is to be amputated; if he commits theft a third time he shall be imprisoned without suffering further amputation. Ibn Ḥanbal's view is that his left hand shall be amputated for the third theft, and his right foot for the fourth, but that for the fifth he shall merely receive a _taʿzīr_ punishment.[52] There is also a _ḥadīth_ of Jābir b. ʿAbd Allāh that the Prophet ordered a thief to be killed for the fifth theft.

When Amputation shall be imposed and when it shall not:

1. Amputation shall be imposed for any stolen property which is sold, having been taken secretly or by means of disguise, from a _ḥirz_, and the value of which is equal to the legally imposed _niṣāb_.
2. Amputation shall not be inflicted for:
   a) Anything below the _niṣāb_ in value.
   b) Anything not stolen from a _ḥirz_.

c) Anything which is edible, such as fresh fruits and vegetables inside a garden.

d) Things free to anyone, such as grass, birds and weeds, in the country.

e) Property stolen during ayear of famine, even if its value is the amount of the nisāb.

f) Anything stolen by a father from his child, by a wife from her husband, or by a slave from his master.

g) Anything religiously prohibited, such as alcohol, a pig or a corpse.[53]

h) Anything stolen where there is no confession obtained without threatening or coercion, or no fair evidence. (This is agreed upon by all fuqahā' of the Sunnī, the Shiʿī and the Ibādī madhāhib.

Those who shall not suffer amputation:

1. An immature person, in accordance with the Hadith of the Prophet:

> No responsibility shall be borne by an immature boy or an immature girl until they reach maturity, nor by a sleeping person, until he wakes, nor on an insane person until he recovers.[54]

In the view of the Shīʿites, an infant shall not suffer amputation for theft, but only be reproved; he will be pardoned once and twice, but on the third occasion the ends of his fingers are to be amputated; then if he repeats the act the parts located lower than those shall be amputated.

The amputation shall be from the joints of the fingertips; or the ends of his fingers shall be scraped until they bleed. If he then repeats the theft his fingers shall be amputated in compliance with the ḥadd.

2. A father or a grandfather, if they steal from their sons, and a wife if she takes the property of her husband.[55]

If a boy who has not attained maturity steals, he shall not be liable to the ḥadd until he reaches the age of fifteen years. Likewise, no ḥadd shall be inflicted on a girl until she attains the age of fifteen years. This is justified on the basis of the ḥadīth of Nāfiʿ cited on the authority of Ibn ʿUmar:

> The Prophet examined me for my fitness to fight in the battle of Al-Khandaq, when I was fifteen years of age, and he permitted me (to fight).

Nāfiʿ said:

> I related this ḥadith to ʿUmar b. ʿAbd al-ʿAzīz when he became Caliph, and he said: 'This is the division between old and young.8

He then wrote to his governors as follows:

> He who has attained the age of fifteen, consider him fit to fight, but he who is below that age, consider him as a child.[56]

One who admits having committed theft, then withdraws his admission, declares his repentance to God, and returns the stolen property to its owner, shall not suffer amputation.[57]

If anyone admits, before the Imām or the Ḥākim, that he has infringed any of the rights of the Muslims,

the Ḥākim may not inflict on him the ḥadd for what he has admitted before him, until the holder of the right or his deputy comes to claim it from him.

Abū Ḥanīfa and Al-Shāfiʿī are in agreement with this; Mālik, Abū Thawr and Ibn al-Mundhir, however, consider that the guilty party shall suffer amputation in any case, because the verse is of universal application.[58]

The thief shall not suffer amputation if the owner of the stolen property pardons him, provided that this takes place before the case is brought before the Imām or the Ḥākim. Once it has been referred to the Imām or the Ḥākim, the ḥadd may not be abrogated, but must be imposed.[59]

<u>The ḥadd applied to slaves (Mamālīk):</u>

There is disagreement among the fuqahā' on this; some say that male or female slaves shall suffer amputation if they commit theft, while others say that they shall not. Those who think that amputation should be inflicted justify this view on the basis of the verse concerning the male thief and the female thief, since it does not stipulate that they should be free. This is accepted by the Ḥanbalīs and the Ḥanafīs.[60]

Those who reject amputation justify this view on the basis of the relation on the authority of Ibn ʿAbbās:

> No amputation shall be inflicted on a male or female slave; this Qiṣās is divisible, because the text says: Impose on slaves half of what is to be imposed on free men.[61]

Al-Shāfiʿī and his followers are among those who do not accept amputation for slaves. Others consider the ḥadd with regard to slave girls to be half of that of free

women or girls; they also consider the ḥadd with regard to male slaves to be half the ḥadd which is imposed on free men. This is the position of Abū Sulaymān and his followers - Ahl al-Ẓāhir - who regard the ḥadd in respect of male and female salves as half of the ḥadd in respect of free men and women. Applying this to the amputation of the hand, they amputate half of the hand, i.e. the fingers.[62]

The ḥudūd for theft are imposed also on the Ahl al-Dhimma. If a Muslim steals from a Dhimmī, the ḥadd of amputation shall be inflicted on him if what is stolen amounts to the niṣāb, is stolen from a ḥirz and is something that can be sold and bought. Similarly, if a dhimmī steals from a Muslim, the ḥadd shall be inflicted on him, if the theft is proved, and if the same conditions apply to the stolen property.[63]

VI. Al-Baghy (Rebellion)

The rule covering Baghy in the Mosaic Law is:

> The lesser penalty is given in sentence against whoever disobeys the rulers and contradicts the judgements passed by the courts or whoever resists or attacks by force the aides (helpers) of justices (judges) during the performance of their duties.[1]

In the Islamic Sharīʿa, Almighty God says:

> And if two parties of believers fall to fighting, then make peace between them both, but if one of them transgresses beyond limits against the other, then fight you (all) against the one that transgresses till it complies with the command of Allāh, then if it complies, then make peace. Verily! Allāh loves those who are fair and just.[2]

Bughy is acting in order to alter the system of Government by force, or refusal to obey, based on force. It is a crime against the system of Government and is not directed against the social system; it is a political crime.

Bughāt (rebels) as defined by the Fuqahā', are those who disobey the Imām - the Head of State - with plausible justification, and who are firm and unwavering in their opinion.[3] Those against whom they revolt, or whom they disobey, are called the People of Equity.[4]

The conditions under which a person becomes a bāghī are:

1. It is stipulated that the purpose of the crime shall be either to remove the Head of the State from his position or to refuse to obey him.[5]

2. It is stipulated that bughāt shall have offered a justification, i.e. that they shall claim to have a reason for their revolt and that they shall give evidence for the validity of their claim, even if these are weak, for example, the claim of those who revolted against ʿAlī that he knew the murderers of ʿUthmān and could have seized them, but that he did not punish them, because he had acted in collusion with them.[6]

3. It is stipulated that to be considered a baghī a person must act together with others. If he is not part of a group he is not considered as a baghī, even if he claims to have a reason for disobeying the Ruler or the Government.[7]

4. It is stipulated that the crime should be committed during a revolution or a Civil War which has arisen for that very purpose.

This was the sunna of ʿAlī b. Abī-Ṭālib with regard to the Khawārij.[8]

Bughāt have rights. If they segregate themselves and meet in a particular place, nobody has any authority over them, as long as they do not refuse to meet any obligation and do not disobey. This was ʿAlī's situation with the Khawārij when they retired to al-Nahrawān; he even appointed a ruler for them and they remained obedient to him for some time. Later they killed this ruler, and it was for this act of disobedience[9] that ʿAlī fought them.

If the Imām appoints a Governor for the Bughāt Mālik, Al-Shāfiʿī and Ibn Ḥanbal stipulate that he should not make war on them first, but should warn them, and reprove them. He should not attack them until they start hostilities, and his intention in doing so should be to restrain them; this is quite different from the situation with apostates, and enemies with whom one is at war,[10] when the object is to kill them.

Abū Ḥanīfa, on the other hand, considers that their gathering together and their refusal to obey constitutes a sufficient cause for fighting them.[11]

Mālik, Al-Shāfiʿī and Ibn Ḥanbal are of the opinion that any of them that are killed should be washed, provided with a shroud and prayed over. Abū Ḥanīfa and his companions said:

> If they have no followers they should be prayed over, but if they have a group or followers, they should not be prayed over.[12]

However, anyone who pronounces the shahādah must be prayed over.

VII. Shurb (Drinking of Alcohol)

No provision is stated in the Mosaic Law which prohibits intoxicating liquor, but there is a prohibition of gambling. It quotes:

> And the Lord spake unto Aaron saying, Do not drink wine nor strong drink, thou nor they sons with thee, when ye go into the tabernacle of the congregation, lest ye die: it shall be a statute for ever throughout your generations.[1]

> Anyone who adopts gambling or any kind of betting whatsoever, as a craft (trade) for earning a living which causes harm to others shall be penalized by the Great Interdiction or (Deprivation).[2]

In the Sharīʿa, a specific penalty is provided for one who drinks intoxicating liquor. No specific penalty is mentioned in the Sharīʿa as regards gambling but Taʿzīr (reproof) is to be imposed.

The Arabs, before Islām, at the beginning of Islām, and even after the migration to Al-Madina, drank wine. Even ʿUmar b. al-Khaṭṭāb used to drink it and love it, and had numerous gatherings for the purpose of drinking wine.[3] The habit was deep-rooted in them.

They continued to drink wine, even after they had adopted or embraced Islām, while they were in al-Madina. In their opinion the wine was not forbidden and their justification for this was the Verses which were revealed in Mekka:

> And from the fruits of the date-palm, and grapes you derive strong drink, and goodly provision.

> And your Lord inspired the bee, saying:
> Take you habitation in the mountains and
> in the trees and in the gardens of vineyard.[4]

The Arabs understood from the text of these two verses that drinks which they made from the fruits of palm trees, various vines and honey, were licit, like milk, which everyone was allowed to drink. This principle was applied to all other drinks made from wheat, barley, maize and honey. Those who were accustomed to drink continued to do so.

One day, in Al-Madina, ʿUmar b. al-Khaṭṭāb said to the Prophet "Tell me your opinion, Oh Prophet of God, about wine, since it destroys the mind and squanders wealth."[5] Then the following verse was revealed:

> They ask you (O Muḥammad) concerning alcoholic
> drink and gambling. Say "In them is a great
> sin and some benefit for men.[6]

After the revelation of this verse, some, but not all, Muslims considered wine to be prohibited. Then ʿUmar was summoned, and the Verse was repeated to him, so he said: "God, give us a decisive statement about wine!" Later the following verse was revealed:

> O you who believe, approach not prayer when
> you are in a drunken state until you know of
> what you utter.[7]

The reason for the revelation of this verse is that ʿAbd al-Raḥmān b. ʿAwf had invited a group of persons, including ʿAlī b. Abī Ṭālib, after they had had their supper they drank wine, after which the time for prayer arrived. They assigned ʿAlī to lead the prayer, which

he did, and recited the _Surah_ of The Infidels, but with mistakes.[8] Others say that there was another reason, namely that some of the Prophet's companions got drunk and quarrelled at a supper party. It was customary that when any prayer was due, the Prophet's _Mū'adhdhin_ would call: "No drunk person shall come to prayer."[9] Then ʿUmar asked again, saying, "God, give us a decision!" Then two further verses were revealed:

> O you who believe, intoxicants and gambling and erected posts, and arrows for seeking luck or a decision are an abomination of Satan's handwork. So avoid that.
>
> Satan wants only to excite enmity and hatred between you with intoxicants and gambling and hinder you from the remembrance of Allāh and from prayer. So will you not then abstain?[10]

Then ʿUmar was summoned, and the verses were read over to him; when he heard the words "So will you put an end to it?" ʿUmar said: "We will put an end to it, Oh God."[11]

If we consider the three texts about wine, we find that the prohibition - as understood by some - is not decisive, unlike other prohibitions; this caused disagreement among the _ʿUlamā'_. The third text is the only one which states that it should be avoided, and this was revealed after the eighth year of the Hijra. As to the decisive prohibition, this is to be found in the _Sunna_. It is related that ʿAbd Allāh b. ʿUmar said: "The prophet said that anything which is intoxicating is prohibited."[12] He further said: "If a large quantity

of anything intoxicates, then a small quantity of it is prohibited."[13] Two kinds of liquor, khamr and nabīdh, come into the discussion.

Khamr

This word refers to anything liquid that affects the mind. It is called khamr because it is left until it ferments. The meaning of "it affects the mind" in the definition above is that it clouds it.[14]

There is disagreement among the ʿUlamāʾ as to the materials from which khamr is made. Some say that it is made only of dates and grapes; their justification is that the Prophet said: "Wine is made from these two trees", and pointed at a palm tree and a vine.[15]

It is related that Ibn ʿUmar said: "The Prophet said: 'Out of grapes wine is made and out of dates wine is made; out of honey wine is made; out of wheat wine is made; and out of barley wine is made'."[16]

Nabīdh

The ʿUlamāʾ also disagree about nabīdh, which is made from dates, raisins or other things which are soaked[17] in water until their malūḥa (saltiness?) is extracted. It is more accurate to call this a maceration naqīʿ, but it was called nabīdh at that time. It is not wine as we know it nowadays.

This naqīʿ or nabīdh, if fermented in a pan so vigorously that it becomes covered with foam, is prohibited. After three days of soaking, even if it has not fermented,

it is still prohibited, in the opinion of certain madhāhib, such as that of Al-Shāfiʿī.

The ḥadd for drinking liquor

Anyone who drinks wine without coercion, whether it is a small or a large quantity, when sane, mature, capable of reasoning and of speech, shall receive the ḥadd, according to all fuqahāʾ, on the basis of the Ḥadīth of the Prophet: "Anyone who drinks wine, lash him; if he drinks again, lash him; if he then drinks again, lash him; if he drinks again a fourth time, then kill him." The ḥadd is eighty lashes for anyone who drinks wine, whether a small or a large quantity and whether he gets drunk or not.[18]

There is disagreement about the number of lashes to be inflicted, on the basis of Abū Hurayra's tradition:

> A man who had drunk was brought before the Prophet, and He said: 'Beat him', so some of us started beating him with their hands, others with their shoes and others with their garments.[19]

This Ḥadith of Abū Hurayra refers to a very early stage; subsequently the Prophet lashed drinkers. There is, however, nothing to suggest that he awarded more than forty lashes; Abū Bakr also awarded forty lashes.[20]

The increase to eighty lashes took place during the era of ʿUmar, because people persisted in drinking, and the penalty did not restrain them. Reports came from Khālid b. al-Walīd in Iraq and from Abū ʿUbayda in Damascus, informing the Caliph of this.

A number of the Prophet's companions, among them ʿAbd al-Raḥmān b. ʿAwf and ʿAlī, advised ʿUmar to increase the penalty to eighty lashes. This was the opinion of ʿAlī, who said: "If a man gets drunk he hallucinates; once he hallucinates he fabricates lies; therefore inflict on him the Ḥadd fixed for a fabricator of lies." The Companions agreed to this and ʿUmar said to the emissary: "Inform your two Companions about the New Ḥadd".

If a strong man who had drunk was brought before ʿUmar, he inflicted on him eighty lashes, but if a weak man was brought before him he inflicted on him forty lashes.

Mālik, Abū Ḥanīfa, Ibn Ḥanbal, al-Thawrī and their followers adopted this number of lashes.[21] Al-Shāfiʿī, however, considered the ḥadd to be forty lashes, on the basis of the usage of the Prophet, which was not to be disregarded in favour of the usage of someone else. There is unanimous agreement on anything which exceeds the usage of the Prophet. The increase ordered by ʿUmar is regarded as Taʿzīr and it is inflicted at the discretion of the Imām.[22] Abū Thawr and Abū Dāʾūd apply this opinion as well.

This ḥadd is to be established, according to the unanimous agreement of all the ʿUlamāʾ, by means of confession, or by the evidence of two equitable witnesses; this is accepted by all the madhāhib.

Confession is adequate if made only once, according to the ʿUlamāʾ; this is because the ḥadd is not one of mutilation. If this confession is withdrawn, however, such a withdrawal is accepted. The presence of the smell of wine shall not be taken into consideration with the confession.[23]

Evidence:

This must be of two equitable male witnesses who are Muslims and who shall give evidence that the person concerned drank intoxicating liquor.

According to the Ḥanafīs, the Judge shall ask the witnesses what he drank, how he drank it, if he was coerced, when he drank it and where he drank it. The statements given as evidence by the two witnesses must correspond;[24] if they differ, no ḥadd shall be inflicted on the drinker.

No ḥadd shall be inflicted on the basis of the presence of the smell of wine, in the view of the ʿUlamāʾ of Iraq (Al-Kūfa and Al-Baṣra) (Ḥanafī), or in that of Abū Ḥanīfa, Al-Shāfiʿī and Al-Thawrī. Ibn Ḥanbal and Mālik however[25] inflict the ḥadd on this basis, if it is proved by evidence before the Judge. The ʿUlamāʾ of the Ḥijāz (Mālikī) also hold this opinion.

The justification of those who do not take the smell into consideration is that it is possible that the smell may have resulted from the person having gargled with wine, or that he may have mistaken it for water and have spat it out, or that he may have

been coerced, or that he may have eaten a lotus fruit or have drunk apple juice or quince juice, because all of these smell like wine. If it is possible that any doubt can be thrown on the action of drinking, the <u>ḥadd</u> shall not be inflicted.

This opinion is sustained by what ʿUmar b. al-Khaṭṭāb is reported as having said: "I discovered at the house of ʿUbayd Allāh the smell of wine, and he admitted that he had drunk <u>Al-Ṭilā</u>.[26] I told him I was going to enquire about it, and if it was found to be intoxicating, I should lash him[27] - because the smell indicated that he had drunk it.

According to all <u>ʿUlamā'</u>, the drinker of wine shall receive the <u>ḥadd</u>, whether it is eighty lashes or forty lashes. But there is some difference about the distinction between a drinker of <u>khamr</u> and a drunker of <u>nabīdh</u>. In the opinion of Abū Ḥanīfa, a drunker of <u>nabīdh</u> shall not receive the <u>ḥadd</u>, unless he gets drunk from it, in which case the <u>ḥadd</u> shall be inflicted on him, provided that he cannot reason at all, and that he cannot distinguish between a man and a woman; in this case he shall be lashed eighty lashes. In the view of Al-Shāfiʿī, and some other <u>fuqahā'</u>, the <u>ḥadd</u> must be inflicted on the drinker of <u>nabīdh</u>, whether he gets drunk or not.[28]

The method of making <u>nabīdh</u> was that sweet fruits, such as raisins, were soaked in water for one day. It

was also related, on the authority of Ibn ʿAbbās, that nabīdh used to be made for the Prophet, and he used to drink it that day and the next, but after that he would pour it away.[29]

Ibn Ḥanbal said of nabīdh that if it stood for more than three days but did not ferment it was makrūh but not prohibited.

Any juice or nabīdh which is cooked before it ferments, so that it does not become intoxicating, is permitted to all.[30]

The ḥadd for Slaves

The ḥadd for slaves is half the ḥadd, in the opinion of the ʿUlamāʾ; so that in the madhāhib in which the ḥadd is eighty lashes, that for slaves is forty, and in those in which the ḥadd is forty lashes, such as the Shāfiʿīte that for slaves is twenty.

The Ḥudūd

I. Al-Zinā (Adultery/Fornication)

1. Ṣabrī, al-Muqāranāt, 542.
2. O.T., Exodus II, XX, 13-17.
3. Qur'ān, II, 229.
4. Ibn Rushd, Bidāyat al-mujtahid, II, 433.

   Ibn Nujaym, al Baḥr, V, 4. al-Shīrāzī,, al-Muhadhdhab, II, 283. Kāshif al-ghiṭā', Aṣl al-Shīʿa, 183.
5. Mullā Miskīn, Kanz al-daqā'iq, 135.
6. O.T., Deuteronomy, XXII, 22-24.
7. Qur'ān, XXIV, 2.
8. A.J. Wensinck, Ḥadīth, II, 407.
9. Ibn Rushd, Bidāyat al-mujtahid, II, 435.

   Mullā Miskīn, Kanz al-daqā'iq, 154.
10. Ibn Qudāma, al-Mughnī, VIII, 168.

    Abū Yūsuf, al-Kharāj, 168.
11. Al-Kulaynī, al-Kāfī, II, 378.
12. Ibn Rushd, Bidāyat al-mujtahid, II, 435.
13. Al-Kulaynī, al-Kāfī, II, 387.
14. A.J. Wensinck, Ḥadīth, II, 407.
15. Ibn al-Himām, Fatḥ al-qadīr, IV, 134.
16. Al-Anṣārī, Asnā al-maṭālib, IV, 129.

    Al-Shawkānī, Nayl al-awṭār, VII, 254.

    Ibn Qudāma, al-Mughnī, X, 135-144.

    Abū Zahra, al-ʿUquba, 98.
17. A.Uwda, al-Tashrī' al-jinā'i, I, 639.

18. Al-Kulaynī, *al-Kāfī*, II, 286.

Banishment: Those who order banishment comply with the Ḥadīth of ʿUbāda b. al-Ṣāmit mentioned above: "A virgin with a virgin: a hundred lashes and banishment for one year." See: Ibn Rushd, *Bidāyat al-mujtahid*, II, 436 and al-Zarqānī, *Sharh mukhtaṣar*, viii, 83.

19. Kāshif al-ghiṭā', *Aṣl al-Shīʿa*, 182.

20. Ibn Rushd, *Bidāyat al-mujtahid*, II, 436.

Ibn Ḥazm, *al-Muḥallā*, XI, 185.

Abū Zahra, *al- ʿUquba*, 98.

This *ḥadith* is related by all the *Fuqahā'* and to be on the point of *al Fuqahā'* and *al muḥaddithūn*. See Abū Zahra, *al- ʿUquba*, 98.

21. Ibn Qudāma, *al-Mughnī*, VIII, 169.

22. Al-Zarqānī, *Sharh mukhtaṣar*, VIII, 83.

23. Al-Anṣārī, *Asnā al maṭālib*, IV, 30.

24. Ibn Qudāma, *al-Mughnī*, X, 136.

25. Al-Sālim, *al- ʿIqd al-thamīn*, 16.

Abū al Ḥasan, *Mukhtaṣar*, 264-265.

26. Mālik b. Anas, *Kitāb al-muwaṭṭa' with commentary of al-Zarqānī*, III, 11.

27. Ibn Rushd, *Bidāyat al-mujtahid*, II, 435.

28. Abū Yaʿlī, *al-Aḥkām al-sulṭāniyya*, 263.

29. Al-Kulaynī, *al-Kāfī*, II, 383.

30. Al-Shīrāzī, *al-Muhadhdhab*, II, 283.

31. *Ibid*.,

32. Kāshif al-ghiṭā', *Aṣla al-Shīʿa*, 183.

33. *Qur'ān*, XXIV, 30-31.

34. A.J. Wensinck, *Ḥadīth*, IV, 520.

35. Ibn Nujaym, al-Baḥr, V, 4.

Ibn ʿĀbdīn, Ḥāshiya on al-Baḥr, 4-5.

36. Qur'ān, XL, 19.

37. O.T., Leviticus, XX, 13.

38. Qur'ān, VII, 80.

39. Qur'ān, XXI, 74.

40. Ibn Nujaym, al-Baḥr, V, 17-18.

41. Al-Shīrāzī, al-Muhadhdhab, II, 285-286.

42. Ibn Qudāma, al-Mughnī, VIII, 187.

43. Ibid., 189.

44. Al-Shīrāzī, al-Muhadhdhab, II, 286.

45. Al-Kulaynī, al-Kāfī, 294.

46. Kāshif al-Ghiṭā', Aṣl al-Shīʿa, 184.

47. Al-Kulaynī, al-Kāfī, II, 293-294.

48. O.T., Leviticus, XX, 15, 16.

49. Ibn Nujaym, al-Baḥr, V, 18.

50. A.J. Wensinck, Ḥadīth, I, 227.

51. Al-Shīrāzī, al-Muhadhdhab, II, 286.

52. Ibn Qudāma, al-Mughnī, VIII, 189.

53. Al-Kulaynī, al-Kāfī, II, 294.

54. Herbert, Mishnah, 497-408.

55. Qur'ān, XXIV, 20.

56. Ibn Rushd, Bidāyat al-mujtahid, II, 438.

57. Al-Shīrāzī, al-Muhadhdhab, II, 287.

58. Ibn Rushd, Bidāyat al-mujtahid, II, 438.

Ibn Nujaym, al-Baḥr, V, 10. Al-Shīrāzī, al-Muhadhdhab, II, 28

Abū Yūsuf, al-Kharāj, 162. Al-Kulaynī, al-Kāfī, II, 288.

59. Ibid.

60. Ibid.

61. Ibid.

62. Abū Yūsuf, al-Kharāj, 162. Ibn Ḥazm, al-Muḥallā, XI, 171.

A.J. Wensinck, Ḥadīth, III, 25.

63. Ibn Rushd, Bidāyat al-mujtahid, II, 438.

Al-Shīrāzī, al-Muhadhdhab, II, 289. Ibn Nujaym, al-Baḥr, V, 1(

Ibn Qudāma, al-Mughnī, VIII, 158. Al-Kulaynī, al-Kāfī, II, 28{

Al-Māwardī, al-Aḥkām al-Sulṭāniyya, 217.

Ibn Ḥazm, al-Muḥallā, XI, 126.

63a. Danby, Mishnah, 389-391.

64. Al-Kulaynī, al-Kāfī, II, 288.

65. Abū Yūsuf, al-Kharāj, 163. Ibn Rushd, Bidāyat al-mujtahid, II, 437. Al-Kulaynī, al-Kāfī, II, 288.

66. Al-Shīrāzī, al-Muhadhdhab, II, 287.

67. O.T., Deuteronomy, XXII, 22. Herbert, Mishnah, 389.

Ṣabrī, al-Muqāranāt, 23-124.

68. Al-Ghazālī, Iḥyā ʾʿulūm al-dīn, II, 45.

69. Ibn Farḥūn, Tabṣirat al-ḥukkām, II, 169-170.

Ibn Nujaym, al-Baḥr, V, 40-41. Ibn Qudāma, al-Mughnī, X, 353.

70. Al-Shīrāzī, al-Muhadhdhab, II, 186.

Al-Shāfiʿi, al-Umm, VI, 26.

71. Al-Anṣāri, Asnā al-maṭālib, V, 133.

72. Al-Ṭaḥāwī, Margin, IV, 260.

Al-Ḥaṭṭāb, Mawāhib, VI, 231-233.

Ibn Qudāma, al-Mughnī, IX, 43.

73. Al-Shīrāzī, al-Muhadhdhab, II, 186.

74. A.J. Wensinck, Ḥadīth, III, 174.

75. Ibn Ḥazm, *al-Muḥallā*, XI, 175.
Al-Shīrāzī, *al-Muhadhdhab*, II, 288.
Ibn Nujaym, *al-Baḥr*, V, 11-12.

76. Ibn Ḥazm, *al-Muḥallā*, XI, 175.
Al-Shīrāzī, *al-Muhadhdhab*, II, 288.
Ibn Nujaym, *al-Baḥr*, V, 11-12.

77. Ibn Rushd, *Bidāyat al-mujtahid*, II, 433.
Ibn Nujaym, *al-Baḥr*, V, 4.
Al-Shīrāzī, *al-Muhadhdhab*, II, 233.

78. A.J. Wensinck, *Ḥadīth*, VI, 6.

79. *Ibid*., II, 28.

80. Al-Shīrāzī, *al-Muhadhdhab*, II, 284.

81. A. Uwda, *al-Tashrīʿ al-jināʾī*, I, 209.

82. A.J. Wensinck, *Ḥadīth*, III, 64.

83. Ibn al-Himām, *Sharḥ fatḥ al-qadīr*, IV, 139.

84. A.J. Wensinck, *Ḥadīth*, I, 183, and Ibn Ḥazm, *al-Muḥallā*, XI, 153-155.

85. *Qurʾān*, II, 229.

86. Ibn al-Himām, *Sharḥ fatḥ al-qadīr*, IV, 39.

87. Al-Anṣārī, *Asnā al-maṭālib*, IV, 126.
Al-Zarqānī, *Sharh mukhtasar*, VIII, 78.
Ibn Qudāma, *al-Mughnī*, X, 155.

88. Ibn al-Himām, *Sharḥ fatḥ al-qadir*, IV, 147.

89. *Ibid*.

90. Al-Zarqānī, *Sharḥ mukhtasar*, VIII, 76.
Al-Anṣārī, *Asnā al-Maṭālib*, VII, 127.
Ibn Qudāma, *al-Mughnī*, X, 154.

91. Ibn al-Himām, *Sharḥ fatḥ al-qadīr*, IV, 143, 148, 149.

92. Al-Zarqānī, <u>Sharḥ mukhtaṣar</u>, VIII, 76-83.

Al-Anṣāri, <u>Asnā al-maṭālib</u>, IV, 126.

Ibn Qudāma, <u>al-Mughnī</u>, X, 154.

93. Al-Zarqani, <u>Sharḥ mukhtaṣar</u>, VIII, 76.

Al-Anṣārī, <u>Asnā al-maṭālib</u>, IV, 127.

94. Ibn al-Himam, <u>Sharḥ fatḥ al-qadīr</u>, IV, 148.

95. Ibn Rushd, <u>Bidāyat al-mujtahid</u>, II, 438.

Ibn Nujaym, <u>al-Baḥr</u>, V, 4.

Ibn Ḥazm, <u>al-Muḥallā</u>, XI, 176-186.

Kāshif al-Ghiṭā', <u>Aṣl al-Shīʿa</u>, 182.

ʿAlī, <u>Mukhtaṣar al-Basīwī</u>, 264.

96. <u>Qur'ān</u>, XXIV, 4.

97. Ibn Rushd, <u>Bidāyat al-mujtahid</u>, II, 439.

Ibn Nujaym, <u>al-Baḥr</u>, V, 5-6.

Al-Kulaynī, <u>al-Kāfī</u>, II, 288.

ʿAlī, <u>Mukhtaṣar al-Basīwī</u>, 264.

98. Al-Kulaynī, <u>al-Kāfī</u>, II, 291.

Mullā Miskīn, <u>Kanz al-Daqā'iq</u>, 153.

99. Al-Kulaynī, <u>al-Kāfī</u>, II, 290.

Mullā miskīn, <u>Kanz al-Daqā'iq</u>, p.53.

100. <u>Qur'ān</u>, IV, 25.

101. A.J. Wensinck, <u>Ḥadīth</u>, I, 121.

102. Ibn Rushd, <u>Bidāyat al-mujtahid</u>, II, 436-437, 20.

Ibn Nujaym, <u>al-Baḥr</u>, V, 10-11.

Al-Shīrāzī, <u>al-Muhadhdhab</u>, II, 284.

Ibn Qudāma, <u>al-Mughnī</u>, VIII, 177-180.

Ibn Ḥazm, <u>al-Muḥallā</u>, XI, 163-168.

103. Ibn Qudāma, _al-Mughnī_, VIII, 177-180.

Ibn Ḥazm, _al-Muḥallā_, XI., 165.

104. Ibn Ḥazm, _al-Muḥallā_, XI, 165.

Ibn Qudāma, _al-Mughnī_, VIII, 177-180.

II. Al-Qadhf (Defamation)

1. *Qur'ān*, XXIV, 23.

2. Ibn Rushd, *Bidāyat al-mujtahid*, II, 450.

   Ibn Nujaym, *al-Baḥr*, V, 31. Al-Shīrāzī, *al-Muhadhadhab*, II,289

   Ibn Qudāma, *al-Mughnī*, VIII, 215.

3. *Qur'ān*, XXIV, 23.

4. A.J. Wensinck, *Ḥadīth*, I, 381.

5. Al-Māwardī, *al-Aḥkām al-sulṭāniyya*, 221.

   Al-Shīrāzī, *al-Muhadhadhab*, II, 289.

   Ibn Qudāma, *al-Mughnī*, VIII, 216.

   Kāshif al-Ghiṭā', *Aṣl al-Shīʿa*, 184.

   Ibn Ḥazm, *al-Muḥallā*, IX, 142. ʿAlī, *Mukhtaṣar al-Basīwī*, 262-263.

6. Abū Yūsuf, *al-Kharāj*, 165. Kāshif al-Ghiṭā', *Aṣl al-Shīʿa*, 184.

7. Al-Shīrāzī, *al-Muhadhdhab*, II, 289.

   Ibn Qudāma, *al-Mughnī*, VIII, 216.

8. *Qur'ān*, XXIV, 4.

9. Ibn Qudāma, *al-Mughnī*, VIII, 218-220.

10. *Ibid*.

11. *Ibid*.

III. Al-Ridda (Apostasy)

1. O.T., Deuteronomy, IX, 16-21, XIII, 1-10. XVII, 2-9.
2. A. Uwda, al-Tashrīʾ al-jināʾī, I, 243.
3. Qurʾān, II, 217.
4. A.J. Wensinck, Ḥadīth, I, 381.
5. Ibn Ḥazm, al-Muḥallā, XI, 196.
6. Ibn Ḥazm, al-Muḥallā, XI, 191.
7. Ibn Nujaym, al-Baḥr, V, 125.
   Al-Jaḥḥāwī, al-Iqna , IV, 301.
   Al-Shīrāzī, al-Muhadhdhab, II, 238.
   Al-Ḥaṭṭāb, Mawāhib al-jalīl, VI, 233.
8. Al-Dardirī, al-Sharḥ al-Kabīr, IV, 127.
9. Ibn Ḥazm, al-Muḥallā, VI, 192.
10. Ibn Qudāma, al-Mughnī, VIII, 174.

IV. Al-Ḥarāba (Irreligious Militancy)

1. Qur'ān, V, 33,34.
2. Ibn Kathīr, Tafsīr al-Qur'ān, II, 47-50.
   Ibn Rushd, Bidāyat al-Mujtahid, II, 454.
   Abū al-Ḥawārī, Kanz al-Ghināya, 86.
   Kāshif al-Ghiṭā', Aṣl al-Shī'a, 186.
3. Ibn Kathīr, Tafsīr al-Qur'ān, II, 50.
4. Ibn Qudāma, al-Mughni, VIII, 286-287.
5. A. Uwda, al-Tashri al-jina i, I, 542.
   Al-Shīrāzī, al-Muhadhdhab, II, 301.
6. Ibn Qudāma, al-Mughnī, VIII, 287.
   Kāshif al-Ghiṭā', Aṣl al-Shī'a, 186.
7. Ibn Qudāma, al-Mughnī, VIII, 288.
8. Ibn Rushd, Bidāyat al-mujtahid, II, 455-456.
   Al-Kulaynī, al-Kāfī, II, 307.
9. Al-Shīrāzī, al-Muhadhdhab, II, 301-302.
   Ibn Rushd, Bidāyat al-mujtahid, II, 456.
10. Al-Rukbī, al-Musta'dhab, II, 307.
11. Ibn Rushd, Bidāyat al-mujtahid, II, 458.
12. Ibn Qudāma, al-Mughnī, VIII, 298.
13. Qur'ān, V, 34.
14. Ibn Qudāma, al-Mughnī, VIII, 295.

V. Al-Sariqa (Theft)

1. O.T., Exodus, XXII, 1-14; XX, 13.

2. Qur'an, V, 38.

3. Ibn Rushd, Bidāyat al-mujtahid, II, 445.

Mullā Miskīn, Kanz al-daqā'iq, 160.

Al-Shīrāzī, al-Muhadhdhab, II, 244.

Ibn Qudāma, al-Mughnī, VIII, 240.

ʿAlī, Mukhtaṣar al-Basīwī, 255.

4. Ibn Qudāma, al-Mughnī, VIII, 243.

5. Ibn Rushd, Bidāyat al-mujtahid, II, 449.

6. Ibn Rushd, Bidāyat al-mujtahid, II, 449.

Mullā Miskīn, Kanz al-daqā'iq, 160.

Al-Shīrāzī, al-Muhadhdhab, II, 295.

Ibn Qudāma, al-Mughnī, VIII, 248.

7. Ibn Rushd, Bidāyat al-mujtahid, II, 450.

Mullā Miskīn, Kanz al-daqā'iq, 162.

Al-Shīrāzī, al-Muhadhdhab, II, 296.

Al-Kulaynī, al-Kāfī, II, 300.

8. Ibn Rushd, Bidāyat al-mujtahid, II, 449-450.

9. Mullā Miskīn, Kanz al-daqā'iq, 162-163.

10. Al-Māwardī, al-Aḥkām al-sulṭāniyya, 218.

11. Ibn Rushd, Bidāyat al-mujtahid, II, 456.

Al-Shīrāzī, al-Muhadhdhab, II, 294-295.

12. Abū Yūsuf, al-Kharāj, 171.

13. Al-Shīrāzī, al-Muhadhdhab, II, 294-295.

14. Ibid., 293.

15. Al-Māwardī, al-Aḥkām al-sulṭāniyya, 218.

16. Ibn Rushd, *Bidāyat al-mujtahid*, II, 451.

Mullā Miskīn, *Kanz al-daqāʾiq*, 163.

Ibn Qudāma, *al-Mughnī*, VIII, 274.

17. Al-Shīrāzī, *al-Muhadhdhab*, II, 299.

Ibn Qudāma, *al-Mughnī*, VIII, 275, 276.

18. Ibn Rushd, *Bidāyat al-mujtahid*, II, 450.

Mullā Miskīn, *Kanz al-daqāʾiq*, 163.

Al-Shīrāzī, *al-Muhadhdhab*, II, 299.

19. Ibn Qudāma, *al-Mughnī*, VIII, 254-255.

20. A.J. Wensinck, *Ḥadīth*, I, 421.

21. A.J. Wensinck, *Ḥadīth*, II, 455.

22. Ibn Rushd, *Bidāyat al-mujtahid*, II, 446.

23. Ibn Qudāma, *al-Mughnī*, VIII, 241.

24. A.J. Wensinck, *Ḥadīth*, I, 421.

25. A.J. Wensinck, *Ḥadīth*, II, 455.

26. Ibn Rushd, *Bidāyat al-mujtahid*, II, 446.

Al-Shīrāzī, *al-Muhadhdhab*, II, 294.

Mullā Miskīn, *Kanz al-daqāʾiq*, 161.

Ibn Taymiyya, *al-Qiyās fī al-Sharʿ*, 93.

27. *Qurʾān*, V, 38.

28. Ibn Kathīr, *Tafsīr*, II, 55.

29. A.J. Wensinck, *Ḥadīth*, II, 457.

30. Ibn Kathīr, *Tafsīr*, II, 55-56.

Ibn Rushd, *Bidāyat al-mujtahid*, II, 447.

Al-Shīrāzī, *al-Muhadhdhab*, II, 294.

Ibn Qudāma, *al-Mughnī*, VIII, 240.

Ibn Taymiyya, *al-Qiyās fī al-Sharʿ*, 92.

31. Abū Yūsuf, *al-Kharāj*, 167.

32. Kāshif al-Ghiṭāʾ, *Aṣl al-Shīʿa*, 185.

33. ʿAlī, *Mukhtaṣar al-Basīwī*, 200.

34. Ibn Rushd, *Bidāyat al-mujtahid*, II, 448.

35. *Qur'ān*, V, 38.

36. Abū Yūsuf, *al-Kharāj*, 169.

Kāshif al-Ghiṭā', *Aṣl al-Shīʿa*, 185.

37. Ibn Rushd, *Bidāyat al-mujtahid*, II, 454.

38. Ibn Qudāma, *al-Mughnī*, VIII, 278-280.

39. Ibn Rushd, *Bidāyat al-mujtahid*, II, 454.

40. Ibn Ḥazm, *al-Muḥallā*, 147-148.

41. Abū Yūsuf, *al-Kharāj*, 166.

Mullā Miskīn, *Kanz al-daqā'iq*, 163.

Al-Māwardī , *al-Aḥkām al-sulṭāniyya*, 217.

Ibn Rushd, *Bidāyat al-mujtahid*, II, 452.

Ibn Qudāma, *al-Mughnī*, VIII, 259.

ʿAlī, *Mukhtaṣar al-Basīwī*, 264.

42. Ibn Rushd, *Bidāyat al-mujtahid*, II, 452.

43. Al-Kulaynī, *al-Kāfī*, II, 300.

44. Al-Shīrāzī, *al-Muhadhdhab*, II, 301.

45. Al-Rukbī, *Sharḥ al-Muhadhdhab*, II, 301.

46. Ibn Rushd, *Bidāyat al-mujtahid*, II, 452.

Al-Shīrāzī, *al-Muhadhdhab*, II, 301.

47. A.J. Wensinck, *Ḥadīth*, IV, 483.

48. Ibn Rushd, *Bidāyat al-mujtahid*, II, 452.

49. Ibn Ḥazm, *al-Muḥallā*, XI, 158.

50. Ibn Rushd, *Bidāyat al-mujtahid*, II, 453.

Al-Shīrāzī, *al-Muhadhdhab*, II, 300.

Abū Yūsuf, *al-Kharāj*, 168-169.

Ibn Qudāma, *al-Mughnī*, VIII, 250.

Mullā Miskīn, *Kanz al-daqā'iq*, 163.

51. Ibn Rushd, _Bidāyat al-mujtahid_, II, 453.

Ibn Qudāma, _al-Mughnī_, VIII, 264-265.

Al-Shīrāzī, _al-Muhadhdhab_, II, 300.

52. Abū Yūsuf, _al-Kharāj_, 168-175.

Ibn Rushd, _Bidāyat al-mujtahid_, II, 449-451.

Ibn Qudāma, _al-Mughnī_, VIII, 265-277.

Al-Kulaynī, _al-Kāfī_, II, 300.

ʿAlī, _Mukhtaṣar al-Basīwī_, 263.

53. Al-Shirazi, _al-Muhadhdhab_, II, 294.

A.J. Wensinck, _Ḥadīth_, II, 280.

54. Al-Shīrāzī, _al-Muhadhdhab_, II, 294.

55. Abū Yūsuf, _al-Kharāj_, 175.

56. Al-Kulaynī, _al-Kāfī_, II, 299.

Abū Yūsuf, _al-Kharāj_, 169.

Ibn Qudāma, _al-Mughnī_, VIII, 281.

57. Al-Kulaynī, _al-Kāfī_, II, 299.

Ibn Qudāma, _al-Mughnī_, VIII, 284.

58. _Ibid._, 285.

Al-Shīrāzī, _al-Muhadhdhab_, II, 300.

59. Ibn Rushd, _Bidāyat al-mujtahid_, II, 453.

Ibn Qudāma, _al-Mughnī_, VIII, 269.

60. Ibn Rushd, _Bidāyat al-mujtahid_, II, 453.

Ibn Qudāma, _al-Mughnī_, VIII, 269.

61. _Ibid._, 267.

62. Ibn Ḥazm, _al-Muḥallā_, XI, 160-164.

63. _Ibid._, 158.

VI. Al-Baghy (Rebellion)

1. Ṣabrī, al-Muqāranāt, 557-558.

2. Qur'ān, XLIX, 9.

3. Ibn Qudāma, al-Mughnī, X, 49.

4. Al-Zarqānī, Sharḥ mukhtaṣar, VIII, 60.

5. Al-Anṣārī, Asnā al-Maṭālib, IV, 111-112.

Ibn Qudāma, al-Mughnī, X, 52.

Al-Ramlī, Nihāyat al-Muḥtāj, VII, 382.

Ibn Nujaym, al-Baḥr, V, 151.

6. Ibn Nujaym, al-Baḥr, V, 151-154.

Al-Zarqānī, Sharḥ mukhtaṣar, VIII, 62.

Al-Ramlī, Nihāyat al-Muḥtāj, VII, 382-383.

Ibn Qudāma, al-Mughnī, X, 49.

7. Al-Ramlī, Nihāyat al-Muḥtāj, VII, 385.

8. Ibn Qudāma, al-Mughnī, X, 58.

Ibn Qudāma, al-Sharh al-Kabir, X, 71-88.

Al-Anṣārī, Asnā al-Maṭālib, IV, 112.

Al-Ramlī, Nihāyat al-Muḥtāj, VII, 384.

9. Al-Mawardī, al-Aḥkām al-sulṭāniyya, 48.

Ibn Nujaym, al-Baḥr, V, 152. Ibn Qudāma, al-Mughnī, X, 53-58

Al-Ramlī, Nihāyat al-Muḥtāj, VII, 383.

10. Ibn al-Himām, Sharḥ fatḥ al-Qadīr, IV, 411.

Ibn Qudāma, al-Mughnī, VIII, 104-105.

Abū Ya'lī, al-Aḥkām al-sulṭāniyya, 55.

11. Ibn Nujaym, al-Baḥr, V, 142. Al-Kulaynī, al-Kāfī, II, 307.

12. Ibn Qudāma, al-Mughnī, VIII, 116.

VII. Al-Shurb (Drinking of Alcohol)

1. O.T., Leviticus, X, 8-9.

2. Ṣabrī, al-Muqāranāt, 567.

3. Al-ʿAqqād, ʿAbqariyyat ʿUmar, 116.

4. Qurʾān, XVI, 67-68.

5. Al-Bayḍāwī, Tafsīr al-Qurʾān, I, 45.

6. Qurʾān, II, 219.

7. Qurʾān, IV, 43.

8. Ibn Kathīr, Tafsīr al-Qurʾān, I, 500.

   Al-Bayḍāwī, Tafsīr al-Qurʾān, I, 45.

9. Ibn Kathīr, Tafsīr al-Qurʾān, I, 255.

10. Qurʾān, V, 90, 91.

11. Ibn Kathīr, Tafsīr al-Qurʾān, II, 92.

    Al-Bayḍāwī, Tafsīr al-Qurʾān, I, 45.

    According to Abū Daʾūd al-Tirmidhī and al-Nassāʾī.

    A.J. Wensinck, Ḥadīth, I, 79.

12. Ibid., II, 491.

13. Ibid.

14. Al-Rāzī, Mukhtār al-Ṣiḥāḥ, 189.

    Al-Bayḍāwī, Tafsīr al-Qurʾān, I, 303.

    Ibn Kathīr, Tafsīr al-Qurʾān, II, 92.

15. Al-Khaṭīb, al-Ḥudūd fī al-Islām, 87.

    A.J. Wensinck, Ḥadīth, II, 79.

16. Al-Bahnasī, al-Ḥudūd, 82.

    A.J. Wensinck, Ḥadīth, IV, 218.

17. Ibn Qudāma, al-Mughnī, VIII, 305, 317, 318.

18. Ibn Rushd, *Bidāyat al-mujtahid*, II, 443-444.
Al-Shīrāzī, *al-Muhadhdhab*, II, 303.
Ibn Nujaym, *al-Baḥr*, V, 27-28.
Ibn-Qudāma, *al-Mughnī*, VIII, 303.
Kāshif al-Ghiṭāʾ, *Aṣl al-Shīʿa*, 185.
ʿAlī, *Mukhtaṣar al-Basīwī*, 145.

19. Ibn Qudāma, *al-Mughnī*, VIII, 310. According to the relation of Abū Daʾud. Al-Shīrāzī, *al-Muhadhdhab*, II, 304-305. Ibn Nujaym, *al-Baḥr*, V, 31.

20. A.J. Wensinck, *Ḥadīth*, I, 354.

21. Ibn Rushd, *Bidāyat al-mujtahid*, II, 444.
Abū Yūsuf, *al-Kharāj*, 164.
Al-Shīrāzī, *al-Muhadhdhab*, II, 304.
Al-Kulaynī, *al-Kāfī*, II, 297.

22. Al-Shīrāzī, *al-Muhadhdhab*, II, 304.

23. Ibn Qudāma, *al-Mughnī*, VIII, 309.
Ibn Nujaym, *al-Baḥr*, V, 27.

24. Ibn Qudāmā, *al-Mughnī*, VIII, 310.
Ibn Nujaym, *al-Baḥr*, V, 28.

25. Ibn Rushd, *Bidāyat al-mujtahid*, II, 445.
Ibn Qudāma, *al-Mughnī*, VIII, 309.

26. Ibn Qudāma, *al-Mughnī*, VIII, 309.

27. Al-Rāzī, *Mukhtār al-Ṣiḥāḥ*, 189.
Al-Māwardī, *al-Aḥkam al-sulṭāniyya*, 219,220.

28. Ibn Qudāma, *al-Mughnī*, VIII, 317.

29. *Ibid.*, 318.

Extra Note:

* It is told of ʿUmar b. al-Khaṭṭāb that he once noticed the smell of alcohol coming from his son. He questioned his son about this and the son protested that what he had drunk was Ṭilā. On hearing this, ʿUmar did not punish his son, presumably because Ṭilā did not count as alcohol.

However, we find in the account given by Mālik b. Anas (as narrated by Saʿid b. Manṣūr, according to al-Zūrī) that Ṭilā was considered alcoholic and that ʿUmar gave his son 80 lashes (the Ḥadd).

Ṭilā is the juice of some fruit (perhaps grapes) boiled until it becomes thick, and it was used, among other purposes, as an ointment for treating the skin of diseased camels.

Chapter 5

Killing and Wounding

Killing and Wounding

In both the Old Testament and the Qur'ān, killing is divided into premeditated and accidental. The Mosaic Law clearly recognises different categories of killing: premeditated (Exodus 21, 14[1]; Deuteronomy 19, 11-12[2]) and accidental (including perhaps opportunistic: Ex. 21, 13[3]) (Deut. 19, 5-6; 4, 41-43[4] - Ex. 21, 23[5] is doubtful). The penalties are respectively death and exile (at least temporary).

As far as bodily damage, short of killing, is concerned, the criteria appear to be whether the result is permanent or not. If the result is not permanent, no penalty is exacted, except for the payment of compensation to the victim for time necessarily spent inactive (Ex. 21, 18-19[6]); the destruction of a foetus is classed separately (Ex. 21, 22[7]), as an offence for which the judges shall determine the penalty. If, however, permanent damage is caused, the offender is to be punished by the exaction of a vengeance similar to his offence (Ex.21, 23-25[8]), or in a case where a servant (= slave) is the victim, by being compelled to free him or her in compensation.

The Sharīʿa prescriptions, so laid down in the Qur'ān, clearly follow the Old Testament prescriptions very closely (IV, 92-93[9]); (XVII, 33[10];) (V, 45[11]); (II, 178-179, 194[12]). Qiṣāṣ is the basic penalty for both deliberate killing and wounding, and in this to some extent resembles a ḥadd prescription. However, since the right involved is clearly seen as being principally (though scarcely entirely) that

of a human being, rather than of God, it is not generally regarded as in fact a _ḥadd_, except, it seems, by Ibn Rushd.

Ibn Rushd appears to consider, as perhaps others had before him, and certainly others did after him, such as Ibn al-Nujaym, that, although killing and wounding cannot be regarded as belonging to the _ḥudūd_ properly speaking, since pardon and mitigation are permissible, in a sense they do belong to this category, in that the basic punishment is laid down in the Qur'ān. His classification of the _ḥudūd_ is arranged on rather different principles to those of others, in that he puts them into four classes, according to the object of the offence:

1. Offences against the person (i.e. killing and wounding).
2. Offences against "the sexual parts" (i.e. fornication, sodomy, etc.).
3. Offences against property:
   (a) _Ḥarāba_
   (b) _Baghy_
   (c) Theft
   (d) _Ghasb_ (robbery)
4. Offences against honour (i.e. _qadhf_). (Note that Ibn Rushd does not include _shurb_ in any of his categories.

Al-Ghazālī sums up the opinion of most of the _fuqahā'_ in enumerating the offences that attract the infliction of a fixed punishment as seven:

1. _Zinā_ (illicit sexual intercourse).
2. _Sariqa_ (theft - in certain specified circumstances).
3. _Qaṭʿ al-ṭarīq_ (highway robbery).

4. Qadhf (defamation, of a particular nature).

5. Ridda (apostasy).

6. Baghy (rebellion).

7. Shurb (drinking alcohol).

What differentiates it in practical terms from a ḥadd is the possibility of a mitigation of the basic penalty, which is of course, not permissible in the case of a ḥadd. The prescription of Qiṣāṣ has, the Qur'ān makes clear, the object of deterrence (II, 179[14]), which is, it seems, the purpose underlying the ḥudūd generally, but the idea of reconciliation, where possible, is also pursued, and this is regarded as an advance on Old Testament Law (II, 178[15]). There are two possibilities: the victim or the walī/awaliyā' al-dam may pardon the offender outright or may do so in consideration of the payment of blood-money (diya in the case of killing; amounts related to the diya in the case of wounding).

There was disagreement among the fuqahā' on the conditions of payment of the diya[16]:

Abū Ḥanīfa, al-Shāfi'ī and Mālik held that the walī al-dam was not entitled to demand the diya from a killer, once pardon had been granted, except with his consent. Ibn Ḥanbal is said to have given an opinion, on one occasion, in conformity with this view, but is more generally regarded as holding that the walī al-dam was so entitled.

There was also disagreement as to who exactly could be walī/awaliyā' al-dam. Some held that if the only next of kin were female they were not entitled to pardon the

killer, on any basis[17]. Most, however, held the contrary view. The Hanbali madhhabs specifically stated that the wali al-dam was the person who inherited from the victim, whether male or female, and whether related by farḍ or taʿṣir.[18]

Accidental killing (and by extension wounding) attracts the diya on Qur'ānic authority, with an additional atonement (presumably to attend to God's right in the matter) (Qur'ān IV, 92). Here again, the diya can be remitted by the walī al-dam; if it is demanded, the Qāḍī has no discretion in the amount awarded, this being fixed at 100 camels or, where appropriate, their monetary equivalent[19]. The same is true of the irsh, the varying proportion of the diya payable in the case of various wounds and mutilations. If there is no irsh fixed for a particular case, the Qāḍī is to award compensation on the basis of ḥukūmat al-ʿadl.[20]

The diya for a woman is agreed to be half of that for a man. ʿAlī b. Abī Ṭālib is quoted as an authority for this.[21] In the case of wounding, however, there is disagreement: Abū Ḥanīfa and al-Shāfiʿī consider that half of the compensation due to a man is payable, while Ibn Ḥanbal and Mālik consider that the compensation for a woman should be the same as that for a man, up to one-third of the diya and thereafter one-half of that for a man.[22]

There is an intermediate class of killing (and of wounding), known as shibh al-ʿamd (semi-deliberate). This is not recognised, however, by all authorities: Mālik rejects it as an addition to Qur'ānic revelation (ʿamd and khaṭa'). Ibn Ḥanbal rejects it on Qur'ānic authority (II, 194), and

holds that only the result of an action can be judged, intentions being known only to God[23]. Abū Ḥanīfa and al-Shāfiʿī recognise it, on the authority of ʿUmar b. al-Khaṭṭāb, ʿUthmān b. ʿAffān, Alī b. Abī Ṭālib, a number of the companions, and, allegedly, the Prophet[24]. Shibh al-ʿamd, according to Abū Ḥanīfa, depends on the circumstances of the action, and in particular the instrument used; a killing with something that would not normally be considered a weapon is likely to come under this heading[25]. Some of the Shīʿa also accept this.

There are two categories of accidental killing, characterised by error in (1) the act, and (2) the intention of the killer. (Wounding is, again, similarly divided.) (1) Act: for example, someone shooting at a bird hits a man instead; (2) Intention: for example, someone shoots at a man on his own side, believing him to be an enemy[26].

An important area of this subject is that which concerns parental rights. All the madhāhib agree on the principle that a father is not to be punished in respect of his son (this is also extended to a grandfather and grandson). This refers, it is supposed, only to qiṣāṣ in cases of killing. Abū Ḥanīfa, al-Shāfiʿī and al-Thawrī specifically state that this applies to all varieties of killing. Mālik makes an exception: "Unless he throws him to the ground and cuts his throat", but is otherwise obscure. The fuqahāʾ, in general, base their opinion on the ḥadīth of Ibn ʿAbbās.

Abū Ḥanīfa, incidentally, was apparently of the opinion that a father, grandfather and guardian are liable for any injury inflicted on a child. However, he appears to have

abandoned this opinion later, since it is not to be found in the Ḥanafī madhhab. In this madhhab, the diya is compulsory in the case of a father's deliberately killing his son[27].

As far as physical chastisement of children is concerned, this is generally admitted to be a right of the father and the grandfather, provided that it is for the purpose of ta'dīb, which may be rendered as "bringing up properly", that it is not unduly severe but is commensurate with the age of the child, and that it is restricted to children under the age of maturity. The mother has a similar right only when the father is no longer alive, or she is, for any reason, guardian of the child. Most fuqahā' hold that she has no rights in the matter in any other circumstances[28].

Ibn Ḥanbal holds that no liability attaches a father or a grandfather for damage caused to a child by a beating that observes the limits of moderation, but that they are criminally liable for damage caused by a beating that transgresses these limits.

The consensus of the Ḥanafī madhhab is the same as that of Ibn Ḥanbal, as stated by Abū Yūsuf and Muḥammad, namely that a father, grandfather or guardian is not liable for unforeseen consequences of a legitimate action. Abū Ḥanīfa's own possibly abandoned opinion, that he is liable for any harm caused, is referred to above[29].

As far as the teacher's responsibility in physical chastisement is concerned, the point at issue is whether the infliction of it is a right or a duty. Abū Ḥanīfa is alone in considering it a duty, so that no liability attaches to the teacher provided that the father or guardian has given

his permission. Ibn Ḥanbal, al-Shāfiʿī and Mālik consider it a right, so that the teacher is liable if any harm comes to the child on account of chastisement that is unduly severe, meaning not commensurate with its age. In any case, such punishment is intended only for children who have not reached the age of maturity. Al-Shāfiʿī further restricts the right so as to provide that it must be exercised within the bounds of safety, that is to say, presumably, that other individual factors, apart from the age of the child, must be taken into consideration[30].

If a doctor causes harm to his patient, he is not liable, provided that he has acted within the bounds of his professional skill.

Abū Ḥanīfa gives two circumstances that absolutely free a doctor from liability:

1. The pressing need for a doctor's services. If the doctor concerned is the only one available, the necessity of his acting overrides any responsibility he may have for any harm that he may inadvertently cause.
2. The permission of the patient or his guardian for the doctor's acting as he does[31].

Abū Ḥanīfa, Ibn Ḥanbal and al-Shāfiʿī are essentially in agreement with this position. They assume, of course, that the doctor does not intend to harm his patient[32].

Mālik, however, requires the permission of the Governor as a prior condition of the doctor's practising in the first place. This, combined with the permission of the patient or his guardian for the doctor to act in a particular case, relieves the doctor of liability, provided always that he observes the conventions of his profession[33].

The practice of medicine is, in general, a <u>farḍ kifāya</u>; sometimes it can be a <u>farḍ ʿayn</u>, as for example if a doctor is the only one available, and his services are urgently required. In these circumstances, he is liable if he refrains from practising.

Taking part in sports is also subject to similar rules. Such participation is regarded as a <u>farḍ kifāya</u>. This means that the participant's intention is taken into consideration, if any harm is done by him to another participant. If he does so in the course of infringing the rules of the sport, this counts as deliberate harm; but if such harm is caused within the rules, it is accidental[34].

Killing and Wounding

1. O.T., Exodus 21, 14.
2. O.T., Deuteronomy 19, 11-12.
3. O.T., Exodus 21, 13.
4. O.T., Deuteronomy 19, 5-6; 4, 41-43.
5. O.T., Exodus 21, 13.
6. O.T., Exodus 21, 18-19.
7. O.T., Exodus 21, 22.
8. O.T., Exodus 21, 23-25.
9. Qur'ān, IV, 92-93.
10. Qur'ān, XVII, 33.
11. Qur'ān, V, 45.
12. Qur'ān, II, 178-179, 194.
13. Ibn Rushd, Bidāyat al-mujtahid, II, 394.
14. Qur'ān, II, 179.
15. Qur'ān, II, 178.
16. Ibn Rushd, Bidāyat al-mujtahid, II, 401-402.
17. Al-Dardīr, al-Sharḥ al-Kabīr, IV, 227.
    Abū Zahra, al-ʿIqāb, 503.
18. Al-Kāsāni, Badāʾiʿ al-ṣanāʾiʿ, VII, 242.
    Abū Zahra, al ʿIqāb, 503.
    Awda, al-Tashrīʿ al-jināʾī, II, 285.
19. Al-Kāsāni, Badāʾiʿ al-ṣanāʾiʿ, VII, 312.
20. Al-Ḥaṭṭāb, Mawahib al-jalīl, VI, 264-265.
    Awda, al-Tashrīʿ al-jināʾī, II, 285.
21. Abū Zahra, al-Jarīma, 564.
22. Al-Ḥaṭṭāb, Mawāhib al-jalīl, VII, 265.
23. Ibid., 240.

24. Ibn Rushd, Bidāyat al-mujtahid, II, 332-333.

25. Abū Yūsuf, al-Kharāj, 156.

26. Al-Ḥaṭṭāb, Mawāhib al-jalīl, VII, 224.

Abū Zahra, al-Jarīma, 485-504.

27. Al-Ḥaṭṭāb, Mawāhib al-jalīl, VII, 235.

Al-Shīrāzī, al-Muhadhdhab, VII, 186.

Ibn Qudāma, al-Mughnī, IX, 359.

Mālik, al-Mudawwana, XVI, 1.

28. Al-Ṭaḥṭawi, Hashiya ʿalā al-Durr, VI, 275.

29. Al-Kasani, Bada i al-sana i , VII, 305.

Awda, al-Tashri al-jina i, I, 517-519.

30. Al-Shafi i, al-Umm, VI, 166.

31. Al-Kāsānī, Badāʾiʿ al-ṣanāʾiʿ, VII, 305.

32. Al-Ramlī, Nihāyat al-muḥtāj, VIII, 2.

33. Al-Ḥaṭṭāb, Mawāhib al-jalīl, VI, 321.

34. Awda, al-Tashrīʿ al-jināʾi, I, 525-527.

Chapter 6

Taʿzīrāt

Taᶜzīrāt

The Sharīᶜa provides Taᶜzīrāt for the punishment of offences for which no ḥudūd are specified.[2] The taᶜzīr sentence differs according to the degree of guilt, the status of the culprit, and the severity of the penalty which he is thought to deserve. It resembles the ḥudūd in that it is intended to discipline people and to restrain them, but it is different from the ḥudūd in certain points:

1. Consideration is given to the culprit, to the severity and type of penalty which he deserves, and to how he committed the offence. The Prophet said: "Forgive the respectable their lapses"[3] (even if they are equal in the ḥudūd); therefore the taᶜzīr of a proud person may be simply to ignore him, which is sometimes the most severe penalty for him.
2. No pardon or intercession is allowed in the case of a ḥadd, but they are in the case of a taᶜzīr, if it is not a matter of a human right, and in

every case the judge will consider what is the most suitable punishment; anyone who asks for pardon is allowed to be interceded for. It is related that the Prophet said: "Intercede for me". If a *taʿzīr* has to do with the right of a human being, such as a *taʿzīr* for an insult, and the two parties are reconciled, there shall be no *taʿzīr* inflicted on the insulter. Pardoning is allowed both before and after the matter is referred to the Judge, as opposed to the case with a *ḥadd* in which the plaintiff may not relinquish his right, once the matter has been brought before the judge; for example, in the case of theft, if the person who is stolen from relinquishes his right against the thief before contacting the judge, this is permitted, but once the case is legally raised, the judge is not allowed to accept such relinquishment in respect of the *ḥudūd*; the judge cannot pardon the accused; only the victim of the crime may do so.[4]

3. There is a liability attached to the inflicting of a *taʿzīr* penalty which there is not to the inflicting of a *ḥadd* penalty, (unless the number of lashes of a *ḥadd* punishment exceeds one hundred, for example, in respect of the adultery of an unmarried person. If he receives more than one hundred lashes and dies, the beater is liable.) For example: ʿUmar b. al-Khaṭṭāb frightened a

woman by reprimanding her as a ta'zīr while she was pregnant and she miscarried. He consulted 'Alī who considered him liable for the diya for the embryo.[5]

In the Ḥanafī madhhab there is no liability for the blood of anyone who dies as a result of either a ḥadd or a ta'zīr, because it is inflicted by order of the authorities. The person inflicting the penalty is not to be restricted by considerations of safety, except in one case, that of a husband, who, if he reprimands his wife for not performing the prayers or if he forbids her to beautify herself by using cosmetics when she leaves the house, is then liable, because he has gone beyond what the law requires.[6]

The principle regarding a ta'zīr is that it is to be inflicted for the committing of prohibited acts and for the omission of obligations. This principle is agreed upon. But the fuqahā' disagree on the infliction of a ta'zīr for the committing of a makrūh act or the omission of a mandūb act.

A group of 'Ulamā' are of the opinion that no penalty shall be inflicted for committing a makrūh act or for omitting a mandūb act.[7] This is because a penalty may not be inflicted except when the law actually commands or forbids, for example: "Do not kill." Another group are of the opinion that a penalty shall be inflicted for committing a makrūh act and for

omitting to perform a mandūb act,[8] in spite of the fact that no command or prohibition is involved, and the matter is left to individual choice.

Those who adopt this opinion and allow the infliction of a penalty do not consider the committing of a makrūh act or the omission of a mandūb act as a mukhālafa but as a contravention.[9]

Others who allow the inflicting of a penalty stipulate repetition in the committing of the makrūh act or of the omission of the mandūb act. Here the punishment is not for the committing or the omission by themselves but for habitual committing or omission. They consider that habit is constituted by the repetition of the act twice.[10]

Taʿzīr penalties

These begin with trivial penalties such as the giving of advice or a warning, and end with severe penalties such as imprisonment and lashing. The law prohibits the causing of harm in the infliction of taʿzīr; so amputation is not permitted, nor is wounding or taking property. The Sharīʿa intends these penalties only to restrain the culprit and to prevent others following him.[11]

The infliction of taʿzīr in offences for which taʿzīr is lawful is obligatory, in the view of Mālik and Abū Ḥanīfa, although the choice of taʿzīr is left to the discretion of the judge. Al-Shāfiʿī, however, said:

> (It is not obligatory), because a man went to the Prophet and said: 'I met a woman and attained my desire from her without having sexual intercourse with her'; the Prophet said: 'Did you pray with us?' He replied: 'Yes', so the Prophet recited these words from the Qur'ān: 'Good deeds cancel out bad deeds'.[12]

Certain fuqahā', nonetheless, allow death as a taʿzīr, as, for example, in the case of a spy, or a propagator of heresy, or one who was in the habit of committing serious crimes.[13]

The Ḥanafīs generally allow the death penalty as a taʿzīr, and they call it al-qatl siyāsa. Some Ḥanbalī jurisprudents hold the same opinion, especially Ibn Taymiyya and Ibn Al-Qayyim al-Jawsiyya; but only a small number of the followers of the Mālikī madhhab agree with this. Most of the crimes for which they allow execution, such as that of sodomy, are punishable by a ḥadd (i.e. to kill in administration of the ḥadd). Mālik, Al-Shāfiʿī and Ibn-Ḥanbal are of the opinion that the perpetrator of sodomy and the person against whom sodomy is committed have both to be executed in administering the ḥadd. The Mālikīs and Ḥanbalīs regard killing a propagator of heresy as a taʿzīr; some, however, are of the opinion that he is an apostate, so that the punishment is, in fact, a ḥadd.

Lashing

Lashing is considered one of the basic taʿzīr penalties, but there is disagreement as to the number of lashes; Abū Ḥanīfa and Muḥammad al-Shaybānī are

of the opinion that the maximum number of lashes for a *taʿzīr* is thirty-nine, while Abū Yūsuf's opinion is that it is seventy-five. The basis for this limitation is a *ḥadīth* of the Prophet: "Anyone who inflicts a punishment amounting to a *ḥadd*, when the *ḥadd* does not apply, oversteps the limit." Abū Ḥanīfa and Muḥammad consider that the minimum *ḥadd* is that which is inflicted on a slave, i.e. forty lashes, and so they reduce this by one lash, so that the maximum number of lashes for a *taʿzīr* is thirty-nine. Abū Yūsuf, however, considered the *ḥadd* in question to be that for free men, with its minimum of eighty lashes, so he followed ʿAlī in making the maximum for a *taʿzīr* seventy-five.[14]

In the Shāfiʿī *madhhab* there are three opinions: the first agrees with that of Abū Ḥanīfa and Muḥammad, the second agrees with the opinion of Abū Yūsuf. The holders of the third opinion say that the *taʿzīr* shall exceed seventy-five[15] lashes but shall not reach one hundred lashes.[16] There are several opinions in the Ḥanbalī *madhhab*. Three of these agree with the opinions in the Shāfiʿī *madhhab*, but there are two further opinions:

1. That it is improper that the number of lashes for any crime should equal the *ḥadd* penalty for a crime of the same category, but it is proper to equal the *ḥadd* for a crime which is not of the category for which the *ḥadd* is prescribed. For example, the number of lashes for the *ḥadd*

of a non-*muḥṣin* adulterer is one hundred, and the *ḥadd* of a *muḥṣin* adulterer is stoning. If a non-*muḥṣin* person is to be punished for kissing or for being alone with a woman, it is improper that he should receive one hundred lashes; the penalty for such an act shall not amount to the number prescribed for the *ḥadd* when the crime for which the *ḥadd* is prescribed has not been committed.

2. The number of lashes for a *taʿzīr* penalty shall not exceed ten, in any circumstances. The Prophet said: "Nobody is to be lashed more than ten lashes except in the infliction of one of God's *ḥudūd*."[17]

Some *fuqahāʾ* are of the opinion that the minimum number of lashes is three, while others are of the opinion that this minimum is not of universal application; human beings differ from one another, and some may be restrained by the infliction of only one lash, while others will not be affected even by three lashes.

Imprisonment:

The minimum period of imprisonment is one day, but the maximum period is not agreed on. Some *fuqahāʾ* are of the opinion that it shall not exceed six months, others are of the opinion that it shall not amount to one full year, while others again leave the determining of the period to the discretion of the Judge.[18]

There is also imprisonment for an unlimited period, for dangerous criminals; they are imprisoned until they display penitence, otherwise they are kept imprisoned till death to protect the public from their evil acts.[19]

Banishment and Exile:

Certain Shāfiʿī and Ḥanbalī fuqahāʾ are of the opinion that the period of banishment shall not amount to one year. Abū Ḥanīfa sees no objection if the period is one year; he does not consider banishment a ḥadd but a Taʿzīr. Mālik considers banishment a ḥadd, but he has no objection if the period as a Taʿzīr penalty exceeds one year. Certain other fuqahāʾ are of the opinion that banishment does not involve imprisoning a person, but merely putting him under supervision; and if he reforms he may resume his former position.

The Prophet penalized the homosexuals in al-Madina by expelling them and sending them to other places. ʿUmar also punished Ḍubayʿa in the same way, sending him to Al-Baṣra.

Crucifixion is also permitted. This involves a person being tied alive to the trunk of a palm tree or to a vertical piece of wood, for a period of three days, during which he may be given food and drink. The object of this penalty is Tashhīr (public disgrace). The Mālikīs and Shāfiʿīs mention it, but the Ḥanafīs and Ḥanbalīs do not expressly permit it. This does not mean that they reject crucifixion, but that they would adopt any other penalty which preserves the tranquility

of society and which protects the public.[20]

These penalties are not exhaustive, but they are the important ones; there are other penalties which are determined by the judge when a <u>jināya</u> or <u>junḥa</u> is committed. If a thief steals property which amounts to the <u>niṣāb</u> for the infliction of the <u>ḥadd</u>, but not from a <u>ḥirz</u>, he is to be given the maximum number of lashes for a <u>taʿzīr</u>, which is seventy-five. If he has penetrated a <u>ḥirz</u> and entered it, but has been unable to take anything out of it, he is to be beaten thirty lashes.[21] This is because, in the first case, not all of the elements that establish the <u>ḥadd</u> are present. In the second case, the offence is considered as an attempt which has failed because of circumstances beyond the control of the accused, who has intended the theft and prepared for it, but has been unable to take anything, because, for example, the household discovered the matter and interrupted him. There are many other instances besides this. The determining of the penalties for these contraventions and misdemeanours is left to the Judge.

2. Al-Māwardī, al-Aḥkām al-sulṭāniyya, 227.
Ibn Qudāma, al-Mughnī, VIII, 324.
Ibn Nujaym, al-Baḥr, V, 44.

3. Al-Rukbī, Ḥashiya of al-Muhadhdhab, II, 306.
Al-Māwardī, al-Aḥkām al-sulṭāniyya, 228.
Ibn ʿĀbdīn, al-Baḥr, V, 44-45.
Ibn Qudāma, al-Mughnī, VIII, 324.
A.J. Wensinck, Ḥadīth, I, 432.

4. Al-Māwardī, al-Aḥkam al-sulṭāniyya, 228.

5. Ibn Nujaym, al-Baḥr, V, 53.
Al-Māwardī, al-Aḥkām al-sulṭāniyya, 330.

6. Al-Māwardī, al-Aḥkām al-sulṭāniyya, 240.
Ibn Nujaym, al-Baḥr, V, 53.

7. Ibn Ḥazm, al-Iḥkām li-uṣūl al-aḥkām, I, 43.
Al-Jaḥāwī, al-Iqnāʿ, IV, 27--271.
Al-Ḥaṭṭāb, Mawāhib al-jalīl, II, 320.
Al-Kāsānī, Badāʾiʿ al- ṣanāʾiʿ, VII, 63.

8. Al-Ghazālī, al-Muṣtaṣfā, I, 75-76.
Al-Amidī, al-Aḥkām, I, 170.
Al-Nawawī, Tuḥfat al-Muḥtāj, VIII, 18.
Al-Ḥaṭṭāb, Mawāhib al-jalīl, VI, 320.
Ibn Farḥūn, Tabṣirat al-ḥukkām, II, 259-260.
Al-Māwardī, al-Aḥkam al-sulṭāniyya, 312.

9. Al-Ghazālī, al-Muṣtaṣfā, I, 76.
Al-Amidī, al-Iḥkām li-uṣūl al-aḥkām, I, 173-174.

10. Al-Ḥaṭṭāb, Mawāhib al-jalīl, VI, 320.
Al-Māwardī, al-Aḥkām al-sulṭāniyya, 212.

11. Ibn Nujaym, *al-Baḥr*, V, 44.
Al-Ansārī, *Asnā al-Maṭālib*, IV, 171.
Al-Zarqānī, *Sharḥ mukhtaṣar*, VIII, 115-116.

12. Ibn Qudāma, *al-Mughnī*, VIII, 324.

13. Ibn ʿĀbdīn, *Ḥashiya of al-Baḥr*, III, 247-248.
Ibn Taymiyya, *al-Ikhtiyārāt*, 178-179.
Al-Ḥaṭṭāb, *Mawāhib al-jalīl*, III, 357.

14. Ibn al-Himām, *Sharḥ fatḥ al-qadīr*, IV, 214.
Ibn Nujaym, *al-Baḥr*, V, 51.

15. Al-Māwardī, *al-Aḥkām al-sulṭāniyya*, 206.
Al-Anṣārī, *Asnā al-Maṭālib*, IV, 162.
A.J. Winsinck, *Ḥadīth*, I, 431.

16. Ibn Qayyim al-Jawziyya, *al-Furūq al-ḥikmiyya*, 106.

17. Ibn Qayyim al-Jawziyya, *al-Furūq al-ḥikmiyya*, 166.
A.J. Wensinck, *Ḥadīth*, I, 431.

18. Ibn Farḥūn, *Tabṣirat al-ḥukkām*, II, 284.
Ibn al-Himam, *Sharḥ fatḥ al-qadīr*, IV, 216.
Al-Māwardī, *al-Aḥkām al-sulṭāniyya*, 206.
Ibn Qudāma, *al-Mughnī*, X, 348.

19. Ibn ʿĀbdin, *Ḥāshiya of al-Baḥr*, III, 260.
Ibn Farḥūn, *Tabṣirat al-ḥukkam*, II, 264.
Al-Ramli, *Nihāyat al-Muḥtāj*, VIII, 20.
Al-Jaḥawī, *al-Iqnāʿ*, IV, 272.

20. Al-Māwardī, *al-Aḥkām al-sulṭāniyya*, 206.
Ibn Farḥūn, *Tabṣirat al-ḥukkam*, II, 266.

21. Al-Māwardī, *al-Aḥkām al-sulṭāniyya*, 228-229.
Al-Shīrāzī, *al-Muhadhdhab*, II, 306.
Al-Bahnasī, *al-Tashrīʿ*, 181.

Notes on names in the text

(References are to the pages of the principal MS, in the margin of the text.)

10. Ashhab: ʿUmar b. ʿAbd al-ʿAzīz b. Dāʾūd al-Qaysī. Born in Egypt 145/764. Student and scribe of Ibn Wahb. A reliable *muḥaddith* and notable faqīh . Died 204/819, a few days after al-Shāfiʿī.

34. Saḥnūn: ʿAbd al-Salām b. Saʿīd b. Ḥabīb al Tanūkhī Qāḍī of Ifrīqiyya, a post held by no-one else after him. During his incumbency he took no payment from the Sulṭān. Died 240/855.

104. al-Māzirī: Abū ʿAbd Allāh Muḥammad b. ʿAlī b. ʿUmar al-Tamīmī. From Māzir in Sicily but lived in al-Mahdiyya (see below). Wrote commentaries on the *Ṣaḥīḥ* of Muslim, the *Talqīn* of al-Thaʿlabī (unfinished?), the *Burhān* of Abū al-Maʿālī al-Juwaynī, and others. Died 536/1142, at the age of more than 80.

105. al-Madhiyya: two well-known places are so named, one in Morocco, on the Atlantic coast, near Salā, and the other on the east coast of Tunisia, founded in 300/912 by the Shīʿī Mahdī ʿUbayd Allāh. Presumably the latter is the one in question here.

106. al-Suyyūrī: it is not clear who this is. One thing that can be said with certainty is that it is *not* al-Miqdād b. ʿAbd Allāh b. Muḥammad b. al-Suyyūrī, the well-known lawyer and theologian, since he died in 862/1423, almost 400 years after the date of this episode.

136. Aṣbagh: Aṣbagh b. al-Faraj b. Saᶜīd b. Nāfiᶜ. A great Māliki *faqīh* in Egypt; a scribe of Ibn Wahb. Died 225/840.

171. Muṭrif: Abū al-Qāsim Muṭrif b. ᶜĪsa b. Labīb b. Muḥammad b. Muṭrif al-Ghassānī al-Ilbīrī (al-Gharnāṭī). Qāḍī, literary man and historian of al-Andalus. Wrote *Fuqahā' Ilbīra*, *Shuᶜarā' Ilbīra*, *Ansāb al-ᶜArab al-nāzilīna fi Ilbīra wa-akhbāruhum*. Died 356/967.

172. Ibn al-Mājishūn: Abū Marwān ᶜAbd al-Malik b. ᶜAbd al-ᶜAzīz b. ᶜAbd Allāh al-Tamīmī. Died 212/827.

al-ᶜUtbiyya: the principal work of Muḥammad b. Aḥmad al-Qurṭubī, the most important representative of the Mālikī *madhhab* in al-Andalus. Died 255/869.

173. *al-Wāḍiḥa*: a work on the *sunna* and *fiqh* by Ibn Ḥabīb (died 239/953): Abū Marwān ᶜAbd al-Malik b. Ḥabīb b. Sulaymān b. Hārūn al-Sulamī al-Ilbirī al-Qurṭubī.

al-Qaᶜnabī: ᶜAbd Allāh b. Maslama b. Qaᶜnab al-Ḥārithī. Reliable *muḥaddith*. From Medina but lived at Baṣra. Died 221/835.

205. Ibn al-ᶜArabī: Abū Bakr Muḥammad b. ᶜAbd Allāh b. Muḥammad b. ᶜAbd Allāh b. Aḥmad al-ᶜArabī al-Maᶜāfirī. Came from Seville. Polymath, *Qāḍī* of Seville. Died and buried in Fez, 543/1148.

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